

(17,482.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 368.

THE BIENVILLE WATER SUPPLY COMPANY, APPELLANT,

*vs.*

THE CITY OF MOBILE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF ALABAMA.

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*Bill of Complaint.*

Circuit Court of the United States for the Fifth Judicial Circuit and Southern District of Alabama. In Equity. No. 210.

To the honorable the judge of the United States circuit court in and for the southern district of Alabama :

The bill of complaint of The Bienville Water Supply Company, a corporation incorporated by the legislature of the State of Alabama and having its home office in the city of Mobile, against The City of Mobile, a municipal corporation chartered by the legislature of the State of Alabama, and against John Curtis Bush, as mayor of said city, respectfully shows unto your honor :

First. That complainant is a corporation chartered by the General Assembly of the State of Alabama, with its offices and place of business and situs in said city of Mobile. It was so chartered for the purpose, among others, of supplying water to the defendant The City of Mobile, known as the port of Mobile at the time of such incorporation, and to the inhabitants thereof. By the provisions of the act incorporating said complainant it is made obligatory upon it to supply water to Mobile and its inhabitants, in that the following language is used in its charter, to wit: "That said corporation is hereby charged with the duty of introducing into the port of Mobile \* \* \* such supply of pure water as the domestic, sanitary, and municipal wants thereof may require, and for this purpose said corporation is hereby authorized to construct all needed canals and ditches and by pipes and aqueducts as may be best suited for the purpose," &c. This was and is a continuous obligation on said corporation under its charter, and the refusal to comply with such obligation would work a forfeiture of its rights and franchises.

2 Second. In the execution of such purpose complainant laid mains and pipes in the streets of Mobile and established hydrants and fire-plugs therein, and built a large reservoir and erected pumps outside of the city of Mobile connecting with such mains and pipes at a large expense to it, to wit, of about \$800,000. Said property is now in use by it for the purpose of supplying said city and its inhabitants with water, which it is now doing. The city of Mobile is a municipal corporation chartered by the General Assembly of the State of Alabama, and John Curtis Bush is the mayor thereof, an officer created by said charter.

Third. On the 15th day of August, 1888, The Bienville Water Supply Company, this complainant, entered into a contract with the city of Mobile to supply it and its inhabitants with water at certain fixed rates to be paid by the city, and said contract also fixed the rates for the inhabitants thereof for them to pay for water. At such date said city of Mobile had a previous and in some respects a different charter from the one it is now working under, but with the same corporate name, and the present city government is the

successor of the one making said contract with this complainant, and in all respects bound by its contracts, acts, and doings. A copy of said contract so made by and between the complainant and the city of Mobile is hereto appended and marked Exhibit "A" and made a part of this bill of complaint. On the 14th day of April, 1891, said contract was extended and changed, whereby said contract was extended for a period of 12 years from the 1st day of July, 1888, to wit, until the 1st day of July, 1900, and it is now in full force and effect, and this complainant has been working under said contract ever since the entering into the same, and is still working under it. A copy of said amended and extended contract is hereto annexed, marked Exhibit "B," and made a part of this bill. This

3 complainant has faithfully complied with all of the obligations and requirements on its part of said provisions of said two contracts, and is still complying with them, and is ready and willing to carry out all of such provisions.

Fourth. But said defendant has already violated and is still proceeding further to violate its contract with this complainant, in this, that on the 14th day of May, 1898, said city claimed to have bought out a competing water-works plant, to wit, what is known as the "City water works" or "Stein water works;" has taken possession of said water plant; has employed officers and employees to carry on and run the same, and is now carrying on said "Stein" water-works business, selling water to customers, cutting the rates established by and between said city and this complainant, and actively competing with this complainant for the business of selling and furnishing water, and has taken away some of the water consumers and customers from this complainant, thereby decreasing its income and violating the obligation of its contract with this complainant, against the provisions of the constitution of the State of Alabama and also the provisions of the Constitution of the United States, as set forth in article 1, section 10, of said Constitution of the United States, and this complainant claims that said corporation, the city of Mobile, had no right and no authority after entering into said contracts above named to so impair and violate it as above set forth.

Fifth. In addition to the above acts on the part of the city of Mobile, it is now proceeding to erect and build another system of water works to supply the city of Mobile and its inhabitants with water before the expiration of said contracts, Exhibits "A" and "B" of this bill. It claims that it has a right so to do under the provisions of its charter and an act of the legislature of Alabama approved, to wit, on November 30th, 1898. The only provision of said charter on said subject is found in section 21, and is as follows,

4 to wit: "The general council has also the right to contract for, build, or purchase or otherwise acquire public works, subject to the approval of the majority vote of the citizens of Mobile at a special election called therefor." In July, 1897, said election was held in the city of Mobile and a majority of the votes cast were in favor of said city contracting for, building, purchasing, or otherwise acquiring a system of water works to be owned and operated by the city of Mobile and the issuing of \$500,000 of bonds



of the city of Mobile to pay for the same. Acting under and by virtue of the proceedings hereinbefore set forth and also the powers granted to it by said act of November 30th, 1898, the mayor and general council of said city of Mobile are now actively proceeding to acquire a system of water works and have entered into contracts to have the same built, and the building and construction of the same are now actively going on in the city of Mobile, at the cost of nearly or quite \$500,000, and before the termination of the contracts above named with this complainant. Said mayor and general council have accepted the bid of M. T. Lewman and Company, of Louisville, Kentucky, to construct said system of water works, and said contractors are proceeding actively on such work.

Sixth. Further showing that said city intends to proceed to erect and complete its own water works and to compete with the complainant in furnishing and selling water before the expiration of its contract with complainant, complainant alleges that Sperry, Jones & Co., of Baltimore, Maryland, and the city of Mobile have made a contract and agreement that said Sperry, Jones and Company will take said \$500,000 of the water-works bonds at a price a little above par value, and said Sperry, Jones and Company have already taken and paid for a part of said bonds. The city intends to lay and is already laying its water mains and smaller water pipes to a large extent in the same streets, side by side with those of the complainant, equally accessible to the householder and consumer on each side,

5 with ample sets of hydrants, pumping stations, and all the requisites of supplying water to the inhabitants of Mobile, to thus actively compete with complainant in its business and destroy its revenue, and there will arise such conflict in the exercises of the two businesses and in the two works as will necessarily practically destroy the value of the property of complainant and take away from it its customers and income, while its contract with the city to furnish such customers with water at remunerative prices, and prices fixed by the city, as aforesaid, is still in existence and has not expired. There is no complaint on the part of the city, so far as complainant knows, that it has not an abundant supply of wholesome water for all its contractual obligations, and yet the city is taking such action as above alleged, which will indirectly destroy the income of complainant as fully as if it should cause complainant to quit furnishing water altogether to it and its inhabitants, and complainant charges that such action on the part of the city is as fully impairing the obligation of its contract with complainant as if it should pass an ordinance nullifying and directly breaking said contracts. It has no legal right to destroy the value of complainant's plant by thus duplicating it, as aforesaid, while it is under contractual relations with the city, as shown by Exhibits "A" and "B."

Seventh. Complainant further alleges that it has outstanding \$750,000 of negotiable bonds in the hands of *bona fide* purchasers, secured by a mortgage on its plant and all of its property, rights, and franchises, and that it cannot pay the interest or coupons on said bonds if its income is so decreased, as alleged, by competition

of water works owned by the city, and that it will be greatly damaged and ruined by such competition and cannot pay the interest on its bonds held by *bona fide* holders, and that the city is totally insolvent and cannot respond in damages by any  
6 common-law proceeding, and that the only way it can protect itself from heavy loss and damages is by the interposition of this court of equity for its relief as prayed for.

*Prayer for Relief.*

The premises considered, complainant prays that your honor will decree that the city of Mobile has not the power to contract for, build, purchase, or otherwise run the said Stein or City water works as competitors in business with complainant during the contract existing between the city and this complainant for the supplying the city and the inhabitants thereof with water, or to contract for, build, purchase, or otherwise acquire a system of water works to be owned by said municipal corporation as competitors in business with complainant during the existence of the contract between it and the city of Mobile, and that the defendant The City of Mobile be restrained by the order and injunction of this court from making or carrying out any contracts for supplying water to its inhabitants, or for the construction of said system of water works during the continuance of said contract, and that said defendants be further enjoined from proceeding further to construct or acquire a system of water works to be owned by said city during the continuance of said contract between complainant and the city, and that your honor will decree that said municipal corporation has no authority or power to make any contracts to bring water into the city of Mobile to compete with complainant, or to build or otherwise acquire such water works to so compete with complainant for business and break down its profits during said contract, and that it be enjoined from so doing, and that your honor will further decree that the city of Mobile is without the legal right to build or buy any water works at the present time, and that it be enjoined from so doing, and that your honor will grant unto complainant such other and further or  
7 different relief as the nature of the case may require and to your honor may seem meet and proper.

*Prayer for Process.*

Complainant further prays that the municipal corporation, The City of Mobile, and John Curtis Bush, in his official capacity as mayor of Mobile, be made parties defendant to this bill of complaint, and that the usual writ of subpoena may issue out of this court to each of said defendants, commanding them and each of them to appear in this court and demur to or plead to or answer this bill of complaint, as required by the rules of this court, within the time and under the penalties prescribed by law.

BESTOR AND GRAY,  
R. H. CLARKE,

*Solicitors for Complainant.*

FOOT-NOTE.—Each of the defendants is required to answer each and all of the allegations of the foregoing bill of complaint from paragraph 1 to paragraph 7, inclusive.

BESTOR AND GRAY,  
R. H. CLARKE,  
*Solicitors for Complainant.*

STATE OF ALABAMA, }  
County of Mobile. }

Personally appeared before me, William J. Young, a notary public in and for the State and county aforesaid, Walter Wood, of The Bienville Water Supply Company, the complainant in the foregoing bill of complaint, who, being by me duly affirmed, deposes and says that he has read said bill of complaint and knows the contents thereof, and that the matters and things therein stated as facts are true, and that he is authorized to make this affidavit.

WALTER WOOD.

Subscribed and affirmed to before me on this 11th day of February, A. D. 1899.

WILLIAM J. YOUNG,  
*Notary Public, Mobile County, Alabama.*

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# EXHIBIT "A."

This agreement made and entered into this 15th day of August, in the year 1888, by and between the Bienville Water Supply Company, a corporation chartered by and existing under the laws of the State of Alabama, and the city of Mobile, witnesseth:

1. Said Bienville Water Supply Company agrees and contracts to furnish for the use of the city of Mobile two hundred and sixty (260) double-nozzle fire-hydrants, said hydrants to be of the Ludlow or Mathews pattern, to be maintained, kept in repair and replaced when necessary without additional cost to the said city, and to be located as per map now on file in the office of the Bienville Water Supply Company in the city of Mobile, a copy of which is filed with the city clerk; the city of Mobile being hereby accorded the right to discontinue the use of ten hydrants each year, for a period of three years, on mains as now laid, until the discontinuance of thirty (30) hydrants is affected, and the said water supply company agrees to furnish in place of said thirty discontinued hydrants and as rapidly as they may be discontinued, not exceeding ten (10) in any one year, other hydrants in their places to be located as the general council may determine, either upon mains already in existence or upon mains to be laid without additional cost to the said city, provided such additional mains shall not exceed five hundred feet to any one hydrant, and provided also, this is not to interfere with the city's rights under section five of this contract for hydrants in addition to the 260 upon the conditions named in said section five (5).

2. Said Bienville Water Supply Company further agrees to erect

or cause to be erected in some suitable place to be agreed upon by the general council of said city, a gauge which shall indicate an average pressure of eighty (80) pounds at the hydrant for every  
 9 twenty-four hours, failure to maintain such pressure shall abate the price proportionately for the time such failure continues after the expiration of such 24 hours. In addition said water company agrees and guarantees to furnish for fire service during the existence of any fire or conflagration at any time within the city within reach of hydrants through three hundred (300) feet of two and one-half inch ( $2\frac{1}{2}$ ) double leads of hose with one inch nozzle, six vertical streams of eighty feet each; through same hose with one and one-quarter ( $1\frac{1}{4}$ ) inch nozzle six vertical streams sixty feet each. For failure to render this service at any time during such fires or conflagrations said water supply company hereby agrees to forfeit to the said city the sum of one thousand dollars and that thereupon this contract shall immediately cease and terminate; provided, however, that said company shall not be subject to such forfeiture or termination of this contract if by reason of any illegal, unlawful, or improper interference by parties other than said company with the pipes, mains, hydrants, or machinery of said water supply company, it shall be unable to render service. It is further agreed that should said water company by reason of any accident to its pipes, mains or machinery, not the result of negligence on the part of said company, its officers, agents, or employees become unable to render the service contracted for, then said company upon notice to the city authorities, shall have a reasonable time to be agreed upon between said company and said city, in which to make necessary repairs, in which event said water supply company shall abate proportionately the amount agreed upon to be paid under this contract.

3. Said Bienville Water Supply Company further agrees that said city shall have the unrestricted use of said hydrants for fire purposes as well as for the practice of firemen; the free use of water for flushing the gutters of said city, provided, that not more than two hydrants are to be used at any one time, and then only  
 10 during daylight and these for this purpose not during a fire; also the free use of water for all municipal buildings, as well as for a fountain in Bienville square, said water to said fountain to be through a one-inch pipe and only to be used during daylight and not on rainy days.

4. Said water supply company further agrees and binds itself not to charge during the continuation of this contract, for domestic uses a greater or higher rate for water than that now established, a schedule of which is herein incorporated and made a part of this agreement, to wit:

*Private Families.*

One service .....	\$10.00
Each additional faucet or sink .....	5.00
Bath-tub .....	5.00
Stationary wash-tub .....	1.50

Butler's sinks each .....	2.00
Kitchen sinks .....	5.00
Stationary wash-basins .....	1.00
Automatic pan water-closet .....	4.00
Hopper water-closet .....	6.00
Hose sprinkler for lawns and streets, nozzle not to exceed ( $\frac{3}{8}$ " ) three-eighths of an inch .....	10.00
Revolving lawn sprinkler, $\frac{1}{8}$ " openings, 6 hours per day.	10.00
Fountains $\frac{1}{8}$ " jet, 6 hours each day, for each month.....	1.00

Larger fountains, special rates.

Hot or cold water flowing into one vessel will be charged as one tap only.

Apartments and tenement-houses, each flat or suite of rooms charged as one dwelling.

#### *Hotels and Boarding-houses.*

Each faucet and sink.....	12.00
11 Each bed-room.....	1.00
Hopper water-closet.....	20.00
Bath-tub.....	12.00
Automatic pan water closet.....	12.00
Automatic urinal.....	5.00

#### *Private Stables.*

Each horse, including washing vehicles by hand.....	3.00
Each cow.....	2.00
Stable hose.....	5.00

#### *Livery, Public, and Boarding Stables.*

Each stall.....	1.50
Hose for washing, $\frac{1}{8}$ nozzle.....	30.00

#### *Miscellaneous.*

Tapping, including pipe and curb work.....	8.00
Banks and offices, one basin.....	5.00
Bakeries each 300 barrels of flour or fraction....	5.00
Barber shops each chair....	3.00
Boilers, per meter, per 1,000 gallons.....	.50
Drug stores each prescription clerk.....	12.00
Offices and sleeping-rooms.....	5.00
Bars, each bartender.....	12.00
Sprinkling streets, per cart, per month....	20.00
Builders, each barrel of lime or cement.....	.05
Meter rates, per 1,000 gallons.....	.50
Elevators, freight, per annum.....	300.00
Elevators, passengers, per annum.....	500.00

5. Said water company further agrees to furnish, erect, and maintain for the use of the said city any number of additional fire-hydrants the city of Mobile may require during the continuance of

12 said contract at the same rate per hydrant as agreed upon for the said 260 hydrants, provided said water supply company shall not be required to lay more than 500 feet of pipe in order to place or erect any one additional hydrant.

6. The said water supply company hereby agrees to erect and furnish for the use of the said city of Mobile the full complement of hydrants (260) within 60 days from the date hereof.

In consideration of the above-recited premises and the undertakings and stipulations therein of the Bienville Water Supply Company, the city of Mobile hereby contracts with the said water supply company for the use of two hundred and sixty (260) double-nozzle fire-hydrants, and agrees to pay said water supply company for the use of said hydrants at the rate of \$50.00 a hydrant per annum, during the continuance of this contract. It is mutually agreed that said contract shall be for a period of six years, the payments to be made thereunder to be monthly on or before the 10th day of each month, the city reserving the right to withhold one month's full pay during the continuance and until the termination of this agreement. It is mutually agreed that this contract shall take effect as of the first day of July 1888, as to hydrants already erected and that the use of the additional hydrants of the full complement (260) to be erected, shall be paid for from the 1st day of each month after they are put down and ready for service.

It is further understood that the use of hydrants under private contract are not to be paid for by the city.

The city of Mobile further agrees in satisfaction and settlement of the claim of the Bienville Water Supply Company for water consumed previous to the 1st day of July 1888, to pay the sum of \$500.00 the same to be paid on the execution of this contract.

13 In case at any time the said Bienville Water Supply Company shall fail or refuse to comply with the terms of this contract according to its true intent and meaning as to any one or more things herein provided and agreed to be done and performed on its part and shall so remain in default for the space of ten days without any satisfactory reason upon its part, then it shall and may be lawful and proper on the part of the corporate authorities of the city of Mobile to declare this contract rescinded and wholly abandon the same upon giving notice thereof to the said Bienville Water Supply Company, always provided however, that the said corporate authorities of the city of Mobile, shall on their part have fully paid, performed and fulfilled all things and everything on their part which up to that period of time has been or may be required to be paid, performed, and fulfilled on the part of the said city to or towards the said Bienville Water Supply Company.

In testimony whereof, the Bienville Water Supply Company, has caused its president to sign his name hereto and has also caused its corporate seal to be attached, and the said city of Mobile has caused the mayor thereof to sign his name hereto, and has caused its cor-



porate seal to be hereto attached, both in duplicate, this 14th day of August, A. D. 1888.

THE BIENVILLE WATER SUPPLY  
COMPANY,

By GEORGE A. KETCHUM, *President.*

THE CITY OF MOBILE,

By JOSEPH C. RICH, *Mayor.*

Attest: JNO. F. SUMMERSELL, *City Clerk.*

EXHIBIT "B."

This agreement made and entered into on this 14th day of April, in the year of our Lord, one thousand eight hundred and ninety-one, by and between the Bienville Water Supply Company, a corporation chartered by and existing under the laws of the State of Alabama, on the one part, and the city of Mobile, on the other part, and having for its object the extension and change of the contract heretofore entered into between said parties dated the 14th day of August, A. D. 1888, as hereinafter provided, witnesseth:

Third. That said Bienville Water Supply Company further agrees that said city shall have the unrestricted use of said hydrants for fire purposes as well as for the practice of firemen, and the free use of water for flushing the gutters of said city, and also any sewers that may be constructed, provided, however that the opening, closing, and use of said hydrants for flushing said gutters and sewers shall be under the direct supervision and direction of the chief of the fire department of said city, and provided, further, that not more than two hydrants shall be used at any one time for flushing, and then only during daylight, but that said hydrants are not to be used at any time during a fire; also the free use of water for all municipal buildings, for one fountain in Bienville square, one fountain in Washington square, and two fountains on Government street. These fountains on Government street and in Washington square are to have only three-sixteenth ( $\frac{3}{16}$ ) inch jets. The water pipe from said supply company's main to the fountain in the Bienville square shall be one inch in diameter, and the pipes to the other fountains are not to be larger than three quarters ( $\frac{3}{4}$ ) of an inch in diameter. The water for said fountains are only to be used during daylight, but is not to be used on rainy days.

Fourth. Said water supply company further agrees and binds itself to charge during the continuance of this contract, for domestic uses, a greater or higher rate for water than that now established, a schedule of which is herein incorporated and made a part of this agreement, to wit:

*Private Families.*

One service .....	\$10.00
Each additional faucet or sink .....	5.00
Bath-tub .....	5.00



Stationary wash-tub (each) .....	1.50
Butler's sink .....	2.00
Kitchen sink ..	5.00
Stationary wash-basins .....	1.00
Automatic pan water-closet.....	4.00
Hopper water-closet .....	6.00
Hose sprinkler for lawns and streets, nozzle not to exceed four-sixteenths ( $\frac{1}{4}$ ) or one-quarter $\frac{1}{2}$ of an inch ...	10.00
Revolving lawn-sprinkler, one-sixteenth ( $\frac{1}{16}$ ) inch opening, eight hours per day .....	10.00
Fountains, one-eighth ( $\frac{1}{8}$ ) inch jet, six (6) hours each day for each month .....	1.00

Larger fountains, special rates.

Hot or cold water flowing into one vessel will be charged as one tap only.

Apartments and tenements-houses, each flat or suite of rooms charged as one dwelling.

#### *Hotels and Boarding-houses.*

Each faucet and sink .....	\$12.00
Each bed-room .....	1.00
Hopper water-closet .....	20.00
Bath-tub .....	12.00
Automatic pan water-closet.....	12.00
Automatic urinal .....	5.00

#### *Private Stables.*

Each horse, including washing vehicles by hand.....	3.00
Each cow .....	2.00
Stable hose.....	5.00

#### *Livery, Public, and Boarding Stables.*

16 Each stall.....	1.50
Hose for washing, one-eighth ( $\frac{1}{8}$ ) nozzle.....	30.00

#### *Miscellaneous.*

Tapping, including pipe and curb work.....	8.00
Banks and offices, one basin.....	5.00
Bakeries, each three hundred (300) bbls. flour or fraction...	5.00
Barber shops, each chair.....	3.00
Boilers, per meter per 1,000 gallons....	.50
Drug stores each prescription clerk.....	12.00
Offices and sleeping-rooms.....	5.00
Bars, each bartender.....	12.00
Sprinkling streets per cart, per month.....	20.00
Builders each barrel of lime or cement.....	.05
Meter rates per 1,000 gallons.....	.50
Elevators, freight per annum.....	300.00
Elevators, passenger, per annum....	500.00

Sixth. In consideration of the above-recited premises and the undertakings and stipulations therein of the Bienville Water Supply Company, the city of Mobile hereby contracts with the said water supply company for the use of two hundred and sixty (260) double-nozzle fire-hydrants, and agrees to pay said water supply company for the use of said hydrants at the rate of fifty (\$50.00) dollars a hydrant, per annum during the continuance of this contract. It is mutually agreed that said contract shall be and extend for a period of twelve (12) years from the first day of July 1888, the payments to be made thereunder to be monthly on or before the 10th of the month, the city reserving the right to withhold one month's full pay during the continuance and until the termination of this agreement. It is further understood that the use of hydrants under private hydrants are not to be paid for by the city. In case at any time  
17 the said Bienville Water Supply Company shall fail or refuse to comply with the terms of this contract, according to its true intent and meaning as to any one or more things herein provided, and agreed to be done and performed on its part and shall so remain in default for the space of ten (10) days without any satisfactory reason upon its part, then it shall and may be lawful and proper on the part of the corporate authorities of the city of Mobile to declare this contract rescinded and wholly to abandon the same upon giving notice thereof to the said Bienville Water Supply Company of its intent so to do always, provided, however, that the said corporate authorities of the city of Mobile, shall, on their part, have fully paid, performed and fulfilled all things and everything on their part which up to that period of time has been or may be required to be paid, performed or fulfilled on the part of the said city of Mobile to or towards the said Bienville Water Supply Company.

Seventh. It is agreed between the parties hereto that the provisions of sections one (1), two (2), and five (5) as contained in said original contract of August 15th, 1888, are to be in no manner to be affected by this instrument, except in so far that they are hereby continued in full force until the end of said contract as extended by this contract, but that sections three (3), four (4) and six as herein written are to be substituted therefor and are to be binding on said parties until the expiration of said contract as extended by this contract.

In testimony whereof the Bienville Water Supply Company has caused its president to sign his name hereto and also caused its corporate seal to be attached, and the said city of Mobile has caused the mayor thereof to sign his name hereto and has also caused its corporate seal to be hereto attached, both in duplicate, on the day and date first above written.

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BIENVILLE WATER SUPPLY COMPANY,  
By GEORGE A. KETCHUM, *President*.  
THE CITY OF MOBILE,  
By JOSEPH C. RICH, *Mayor*.

Attest: JNO. F. SUMMERSELL, *City Clerk*.

*Subpoena in Equity.*

UNITED STATES OF AMERICA :

Circuit Court of the United States for the Fifth Judicial Circuit and  
Southern District of Alabama, at Mobile. In Equity.THE BIENVILLE WATER SUPPLY COMPANY, a Corporation }  
Incorporated by the Legislature of the State of Ala-  
bama, Complainant, }

vs.

THE CITY OF MOBILE, a Municipal Corporation Char- }  
tered by the Legislature of the State of Alabama, and  
against John Curtis Bush, as Mayor of said City, De- }  
fendants. }

No. 210.

The President of the United States of America to the City of Mo-  
bile, a municipal corporation, and John Curtis Bush, as mayor  
of said city, who are citizens of the district aforesaid and of the  
State of Alabama, Greeting :You and each of you are hereby commanded and strictly enjoined  
that, laying all other matters aside and notwithstanding any other  
excuse, you and each of you personally be and appear before the  
judge of the circuit court of the United States for the fifth judicial  
circuit and southern district of Alabama, at Mobile, at the clerk's  
office of the said court, in the city of Mobile, at rules to be had on  
the first Monday of April, 1899 (being the 3rd day of said month)  
next, to plead to, answer, or demur to a bill of complaint exhibited  
against you in the said court by The Bienville Water Supply Com-  
pany, a corporation incorporated by the legislature of the19 State of Alabama, who is a citizen of the State of Alabama,  
and to do further and receive what the said court shall have  
considered in that behalf, and this you are not to omit ; and have  
there then this writ.To the marshal of the United States for the said district to exe-  
cute.Witness the Honorable Melville W. Fuller, Chief Justice of the  
Supreme Court of the United States, and the seal of the said circuit  
court, at Mobile, this the 21st day of February, in the year of our  
Lord one thousand eight hundred and ninety-nine.

Attest :

[SEAL.]

RICHARD JONES, *Clerk, &c.*NOTE.—The defendant- is required and hereby notified to enter  
appearance in the above-entitled cause in the clerk's office of said  
court, in the Custom-house building, in the city of Mobile, on or  
before the rule day next ensuing, to wit, the first Monday of April,  
1899, or the bill may be taken *pro confesso* against them.RICHARD JONES, *Clerk, &c.*

BESTOR AND GRAY AND

R. H. CLARKE,

*Complainant's Solicitors.*

*Marshal's Return.*

Received in office this 21st day of February, 1899, and executed by serving copy of the within subpoena on the City of Mobile by handing a copy of the same to R. B. Owen, Jr., clerk of the city of Mobile, and on J. C. Bush, mayor of the city of Mobile, by handing him a copy this 22nd day of February, A. D. 1899.

FRANK SIMMONS,

*U. S. Marshal,*

By C. D. HENDERSON, *Deputy.*

Returned and filed this February 22nd, A. D. 1899.

RICHARD JONES, *Clerk.*

*Demurrer of Defendants to the Bill of Complaint.*

In the Circuit Court of the United States for the Fifth Judicial Circuit, Southern District of Alabama.

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THE BIENVILLE WATER SUPPLY COMPANY, Complainant,

*vs.*

THE CITY OF MOBILE and JOHN CURTIS BUSH, as Mayor of said City, Defendants. }

The demurrer of the defendants, by protestation, not confessing or acknowledging all or any one of the matters and things in said bill of complaint filed in this court against demurrants on Feb'y 21st, A. D. 1899, and numbered 210, to be true in such manner and form as the same are therein and thereby set forth and alleged. Said defendants come now and demur to said bill, and for causes or grounds of demurrer thereto specifically assign the following:

(1.) Because said bill, taken in connection with Exhibits "A" and "B," made a part thereof, shows that no contract was made between the city of Mobile and the Bienville Water Supply Company as to the rates to be charged the inhabitants of said city for water, but that said contract merely fixed a maximum rate that said water company was to charge the inhabitants of said city of Mobile.

(2.) Because said bill of complaint shows that said city of Mobile was specially authorized and empowered by its charter and by the act of the General Assembly of Alabama approved November 30th, 1898 (and of which said act this court will take judicial notice), to buy or to build, erect, and maintain, and to operate water works for the supply of its inhabitants with water, and for the extinguishment of fires, and for sanitary, domestic, and other purposes.

(3.) Because there is nothing shown or alleged in said bill of complaint and in said Exhibits "a" and "B," made a part thereof, which precludes or estops the city of Mobile from buying, building, erecting, maintaining, and operating a system of water works.

(4.) Because said Exhibits "A" and "B," made a part of said bill of complaint, show that the only obligation resting upon and binding upon said city of Mobile is that it shall pay to said Bienville Water Supply Company the sum of fifty dollars

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(\$50.00) each per annum, payments to be made monthly, for two hundred and sixty fire-hydrants placed on the streets of said city by said water supply company until the expiration of said contract on July 1st, A. D. 1900, and it is not alleged or charged in said bill of complaint that the city of Mobile has or intends to repudiate its obligation to pay for said two hundred and sixty fire-hydrants at the rate of fifty dollars each per annum, payments to be made monthly.

(5.) Because said bill of complaint shows that the complainant has slept upon its alleged rights and shows no excuse for its laches in not asserting them.

(6.) Because said bill of complaint shows that the complainant, by not asserting its alleged rights, has allowed the position of the parties to this bill to so change that equitable relief cannot be granted to complainant without doing injustice.

(7.) Because said bill of complaint shows that by not asserting its alleged rights, the intervening rights of Messrs. M. T. Lewman and Company, who contracted with the city of Mobile to build, and the, as the bill shows, are now actively building said water works, and of Messrs. Sperry, Jones and Company, of Baltimore, Maryland, who bought said water-works bonds from said city of Mobile, will be destroyed or seriously impaired.

(8.) Because said bill of complaint fails to allege any facts which show that the city of Mobile has or intends to do or commit any act which will impair the said contract between the city of Mobile and the Bienville Water Supply Company, and which said contract is made a part of the bill of complaint.

(9.) Because it is shown upon the face of said bill of complaint that the city of Mobile did not grant the complainant the franchise to lay its said water mains and pipes in the city of Mobile, but that it was done by the General Assembly of Alabama, and from which it appears that said city of Mobile had no lawful authority to grant or to enter into a contract with complainant, conferring thereby the exclusive right or privilege of supplying water to the inhabitants of said city of Mobile.

Wherefore these defendants demand the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill or any of the matters and things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

B. B. BOONE,  
*City Attorney,*  
E. L. RUSSELL,  
*Solicitors for Def'ts.*

STATE OF ALABAMA, {  
County of Mobile. }

John Curtis Bush makes solemn oath and says that he is the mayor of the city of Mobile, the municipal corporation joined with him as defendant in the above and foregoing bill, and that the foregoing demurrer is not interposed for delay.

JOHN CURTIS BUSH,  
*As Mayor of the City of Mobile.*

Sworn to and subscribed to before me this 23rd day of February, 1899.

FRANCIS O. HOFFMAN,  
Notary Public in and for Mobile County, State of Alabama.

We hereby certify that, in our opinion, the foregoing demurrer is well founded in point of law.

B. B. BOONE,  
City Attorney,  
E. L. RUSSELL,  
Solicitors for Defendants.

Filed February 23rd, 1899.

RICH- RD JONES, Clerk.

23 *Opinion of the Court on the Demurrer of the Defendants to the Bill of Complaint.*

Circuit Court of the United States for the Southern District of Alabama.

BIENVILLE WATER SUPPLY COMPANY	} No. 210. In Equity. May 22nd, 1899.
<i>versus</i> THE CITY OF MOBILE ET AL.	

Toulmin, District Judge :

This is a bill in equity filed by the complainant to enjoin the defendants from making or carrying out any contracts for supplying water to the inhabitants of the city of Mobile or for the construction of a system of water works for that purpose during the continuance of the contract made between the complainant and said city (which is set out and exhibited as a part of the bill), and to enjoin the defendants from proceeding to build or acquire a system of water works to be owned by said city to bring water into the city during the continuance of said contract.

The defendants have filed a demurrer to the bill, setting up various grounds of objection thereto, which it is unnecessary to specifically mention here.

The facts, as are shown by the averments of the bill, are substantially as follows: The complainant is a corporation chartered by the legislature of the State of Alabama for the purpose, among other things, of supplying water to the city of Mobile and its inhabitants. It was authorized to construct all needed canals, ditches, pipes, aqueducts, etc., as may be best suited for the purpose, and was "charged with the duty of introducing into the city such supply of pure water as the domestic, sanitary, and municipal wants may require." In the execution of this purpose the complainant laid mains and pipes in the streets of the city and established hydrants and fire-plugs therein, and built a reservoir, and erected pumps connecting with such mains and pipes at large expense to itself. Said property is now in use by the complainant for the purpose of supplying said city and inhabitants with water, which it is now

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doing. The city of Mobile is a municipal corporation, chartered by the legislature of the State.

On the 15th day of August, 1888, the complainant entered into a contract with said city, by which it agreed and contracted to furnish for the use of the city 260 fire-hydrants and to furnish water for fire service of a certain number of streams and pressure, and further agreed that the city should have the unrestricted use of said hydrants for such fire purposes and the free use of water for all municipal buildings. The complainant further agreed not to charge during the continuance of the contract for domestic use a greater or higher rate for water than that named or specified in the contract. In consideration of the undertakings and stipulations of the complainant as recited in the contract, the city agreed to pay to the complainant for the use of said hydrants at the rate of \$50.00 a hydrant per annum during the continuance of the contract. It was mutually agreed that the contract should be for six years; the payments to be monthly. On the 14th day of April, 1891, the contract was extended for a period of 12 years from the first day of July, 1888, to wit, to the 1st day of July, 1900, and is now in full force and effect.

The bill avers that the complainant has complied with all of the obligations and requirements of the contract on its part, is still doing so, and is ready and willing to continue so to do.

25 It avers that the defendant has violated and is proceeding to further violate its said contract with the complainant in that on the 14th day of May, 1898, it had bought and taken possession of a water-works plant, and is now operating the same, selling water to customers and cutting rates below those fixed in said contract, and actually competing in the business of selling and furnishing water to its inhabitants, and has taken away some of complainant's water customers, thereby decreasing the latter's income. It is further averred in the bill that said defendant is building another system of water works to supply itself and its inhabitants with water before the expiration of said contract, and that it claims the right so to do under the provisions of its charter and an act of the legislature of the State approved November 30th, 1898. The charter provides that the city has the right to contract for, build, purchase, or otherwise acquire public works subject to the approval of a majority vote of the citizens of Mobile at a special election called therefor. In July, 1897, an election was held and a majority of the votes cast were in favor of the city contracting for, building, or otherwise acquiring a system of water works to be owned and operated by the city, and the issuing of bonds of the city to pay for the same. The act of November 30th, 1898, authorized the issuing of bonds for the purpose. It is further averred that acting under and by virtue of the authority and power granted by its charter and the said act of November 30th, 1898, the city of Mobile entered into a contract to have a system of water works built, and the building of the same is now going on, and that it made a contract with certain persons to take said bonds, and that such persons have already taken and paid for a part of them.



The complainant contends that while it is under contractual relations with the defendant, as shown by the contract exhibited to the bill, the defendant has no legal right to impair the value of its plant, and to destroy or diminish its income therefrom, which complainant claims would be the effect of defendant's action in building water works and furnishing water to its inhabitants. It is averred that the defendant is insolvent, and that the only way the complainant can protect itself is by the interposition of a court of equity.

It will be observed that there is no claim by the complainant that it has been granted an exclusive franchise to furnish water to the defendant and its inhabitants, but that the contention is that under the contract between the parties and as exhibited as a part of the bill the defendant has no right to furnish water to other persons or to build or acquire a system of water works to supply water to itself and its inhabitants during the continuance of the contract, and that to do so is a violation of it.

The equity of this claims depends, in my judgment, upon two inquiries—first, whether the defendant contracted with the complainant to furnish water to the inhabitants of the city of Mobile or gave it the right to do so during the continuance of the contract, and, second, whether the defendant covenanted with the complainant not to build or acquire water works of its own during the continuance of said contract.

The city of Mobile granted to complainant no rights or privileges whatever. The legislature of the State granted it the right to build water works and to use the streets of the city of Mobile for laying pipes, mains, etc., for water purposes, and, among other things, authorized it and the city of Mobile to contract together for supplying said city with water. They made a contract, but there is no provision in it for furnishing the inhabitants of Mobile with water—no stipulation on the part of the complainant to do so—but it is clear that the parties contemplated that the complainant would contract with the inhabitants of the city to supply them with water for domestic purposes, for it is stipulated in the contract that the complainant shall not charge for water supplied for domestic purposes higher rates than those specified therein. It did not fix rates to be charged the inhabitants of the city for water, but stipulated only for a maximum rate to be charged.

The defendant was authorized and empowered by its charter and the act of the legislature of November 30th, 1898, to build or otherwise acquire water works of its own for the supply of water to itself and its inhabitants for the extinguishment of fires and for sanitary, domestic, and other purposes, and the defendant in its contract with the complainant made no covenant not to do so. It agreed to pay to the complainant, at the rate of \$50.00 a hydrant per year, for a given number of hydrants erected and supplied by the complainant, and to make the payments monthly. As long as it complies with this obligation it meets all the requirements of the contract on its part. There is no averment that the defendant has by act or word repudiated this obligation. There is no averment

that it has failed or refused to make the payments stipulated for, or that it intends to do so. If the defendant were to refuse or fail to receive or use the water furnished or offered to be furnished by the complainant, as required by the contract, it would still be bound by the contract, and until its expiration to make the payments stipulated therein. *Furgus Falls Water Company vs. The City of Furgus Falls*, 65 Federal Reporter, 586.

The counsel for the complainant has cited several authorities to sustain the contention that the defendant having made a contract with the complainant which does not expire until July 1st, 1900, cannot violate it without liability, and, in view of the circumstances of the case, should now be enjoined from violating it. The principal of law involved in the proposition is readily conceded, but the answer to the contention is that there are no facts averred in the bill showing that the defendant has violated, is violating, or intends to violate the contract it made with the complainant. A careful examination of the cases cited, I think, will show their inapplicability to this case. None of the contracts considered in those cases were like the one here.

The case of *White vs. The City of Meadville*, 35 Atlantic Reporter, 695, was a case where the city was granted by the State the exclusive right to supply itself and others with water or to make contracts with and authorize any person or company to erect a water plant and give it the exclusive right to furnish water to the city and its inhabitants for a given period. There were two distinct methods by which the city could supply itself with water. The court held "that the city, having adopted one method, excluded its right to exercise any further power in the premises. There was no grant of power to put both methods in operation at the same time. Once the power had been exercised to supply the city by contract through another creature of the same sovereign, then the municipal function had passed from the city and must be performed by the other contracting party. The city having exercised its authority and adopted the secondary method, and made a bargain, it must stand by the bargain."

The case of *Furgus Falls Water Company vs. City of Furgus Falls*, *supra*, was a suit at law brought to recover a sum of money on account of rent for water supplied to the defendant under a certain contract. The city contracted with the water company, giving it the exclusive privilege of laying water mains in the city for thirty years. The contract provided that the company should furnish the city with a certain number of hydrants for a stated price per year, and stipulated that at the end of ten years the city might, at its option, buy the water works. The contract also provided that the city would during the period named abstain from granting to any other party the right or privilege to lay pipes or to furnish water to the city or its inhabitants, and to abstain from doing so for or on its own behalf. Some three months before the expiration of the ten years the city council passed a resolution declaring the contract null and void and cancelled, and determined that the city would no longer take water from the water company

under that contract, but undertook *ex parte* to make another contract. The water company refused to accept the last contract proposed or to recognize it. All the rents were paid up to the last quarter under the original contract, and this suit was brought to recover for that quarter. The city resisted payment of rent on the ground that the contract was illegal, unreasonable, oppressive, and contrary to public policy, and that the city council had no authority to make it. The only question in the case, as stated by the judge who decided it, was "whether the contract was so unreasonable, so oppressive, so contrary to public policy, that the law will interfere and declare it void." He said, "I am of the opinion that if the question had been raised at the outset it is doubtful whether the city council had the authority to give an exclusive contract of this character to any person for the purpose stated." He further said, "I do not consider that the contract is so unreasonable, oppressive, or contrary to public policy as to be void," and held that the plaintiff was entitled to recover the full amount claimed for rent.

In the case of *The Atlantic Water Works Company vs. Atlantic City*, 39 New Jersey Equity, 367, the water company contracted with the city for the purpose of supplying the city with  
30 water and accepted the provisions of an ordinance regulating the mode of supplying the water both for public and private use, and was granted the exclusive privilege of furnishing water to the city and its inhabitants. The city covenanted that it would not grant to any other person the right to lay pipes and furnish or supply water to the city and its inhabitants. The company constructed its works at large expense and supplied the water as required by the contract. The city subsequently undertook to grant this right to other persons. A bill was filed to enjoin it. The city set up that its contract with the complainant was *ultra vires* and void. The court held that whether or not the city's grant of the exclusive privilege of furnishing water was *ultra vires* and void, the city had exhausted its power as to providing a water supply; that the complainant's franchise was exclusive, and that the court would protect it against any invasion of its rights by persons laying pipes under the city's authority to compete with it. The court said that the city had already executed its power in the premises, and had secured the water company by contract against competition. An injunction was granted.

The case of *The City of Walla Walla vs. The Walla Walla Water Company*, 172 United States, page 1, was a bill in equity filed by the water company to enjoin the city of Walla Walla from erecting water — in pursuance of an ordinance of the city to that effect. The city was authorized by its charter to grant the right to use the streets of the city for the purpose of laying pipes intended to furnish the inhabitants of said city with water to any persons or association of persons for a term of not exceeding twenty-five years; and it was further provided that the city shall have power to erect and maintain water works within or without the city limits or to authorize the

erection of the same for the purpose of furnishing the city or its inhabitants with a sufficient supply of water. An ordinance was passed by the city council and accepted by the water company granting to such company "for a term of twenty-five years the right to lay mains and pipes in all the streets of the city for the purpose of furnishing the inhabitants thereof with water," and entering into a contract with the company for the same term by which the city agreed to pay certain rentals, and bound itself not to erect, maintain, or become interested in water works unless the contract should be avoided by the judgment of a court of competent jurisdiction on the ground of a substantial failure of performance by the company. The language of the contract is that "until such contract shall have been so avoided the city of Walla Walla shall not erect, maintain, or become interested in any water works." The water company substantially complied with the terms and conditions of the contract, which was still in force at the time the bill was filed. After this contract had been in force and the stipulated rentals paid for about six years an ordinance was passed to provide for the construction of a system of water works for the purpose of supplying the city and its inhabitants with water and the issue of bonds to provide the necessary funds. The supreme court said in substance that the contract amounts to this: If the city should desire to establish water works of its own, it would do so by condemning the property of the company and making such changes in its plant or such additions thereto as it might deem desirable, but that it would not enter into a direct competition with the company during the life of the contract; that so long as the contract had not been avoided by a court of competent jurisdiction, as provided in the contract, but remained in force, the city had no right to establish water works because it had so covenanted with the water company; and the injunction was sustained.

Thus we have seen that the contract in every case to which our attention has been called either provided for an exclusive right in the water company to supply water to the city and its inhabitants, granted or contracted for by the city, or contained in a covenant by the city that it would not erect water works of its own, and would abstain from granting the right to do so to a competing company during the life of the contract.

And we have seen that the contract under consideration in this case contains no such provisions. We have seen that it does not attempt to grant any exclusive right to the complainant; that it contains no stipulation or agreement that the complainant shall furnish water to the inhabitants of the city of Mobile, and no covenant by the city that it will not build or acquire water works of its own, or abstain from supplying water to its inhabitants during the continuance of the contract. The parties might have made such a contract, but they did not do so.

From the views already expressed herein, and which must dispose of this case here, it is unnecessary to decide or discuss the question of the laches raised by the defendant in the 5th, 6th, and 7th grounds of demurrer.

My conclusion, then, is that the complainant has shown no valid or legal grounds on which to grant it the injunction prayed for in the bill.

My opinion, therefore, is that the demurrer on the 1st, 2nd, 3rd, 4th, 8th, and 9th grounds assigned is well taken, and that it should be sustained, and it is so ordered.

Filed May 22nd, 1899.

RICHARD JONES, *Clerk*.

33     *Decree of the Court Sustaining the Demurrer of the Defendants to the Bill of Complaint.*

Circuit Court of the United States for the Southern District of Alabama.

THE BIENVILLE WATER SUPPLY COMPANY	} No. 210. In Equity. Decree on Demurrers.
<i>versus</i> THE CITY OF MOBILE ET AL.	

This cause coming on to be heard on the demurrer filed by the defendants to the bill of complaint, and the same having been submitted for decree thereon and having been duly considered by the court, it is now ordered, adjudged, and decreed by the court that grounds 1, 2, 3, 4, 8, and 9 of said demurrer be, and the same are hereby, sustained.

It is further ordered that the complainant be, and it is hereby, allowed fifteen (15) days from the date hereof within which to amend its bill as it may be advised.

Made in open court this May 22nd, A. D. 1899.

HARRY T. TOULMIN, *Judge*.

Filed May 22, 1899, and entered on minutes, page 712.

RICH'D JONES, *Clerk*.

*Motion by the Defendants to Dismiss the Bill of Complaint.*

Circuit Court of the United States, Southern Dist. of Alabama.

THE BIENVILLE WATER SUPPLY COMPANY	} No. 210. In Equity.
<i>versus</i> THE CITY OF MOBILE ET AL.	

Comes the respondent The City of Mobile and moves the court to enter a decree dismissing the bill of complaint in this cause, the said complainant not having amended its said bill within 15 days from May 22nd, 1899, in accordance with the order

34     heretofore made in this cause on said date.

B. B. BOONE AND

E. L. RUSSELL,

*Solicitors for Respondents.*

Filed June 7th, 1899, and entered on the motion docket, page 494

RICHARD JONES, *Clerk*.

June 7th, 1899.—Received this day at 12 o'clock copy of the above motion.

D. P. BESTOR,  
*Solicitor for Complainant.*

*Order of Court Dismissing the Bill of Complaint.*

Circuit Court of the United States, Southern Dist. of Alabama.

FRIDAY MORNING, June 9th, A. D. 1899.

Present: Honl. Harry T. Toulmin, judge presiding.

Minutes, page 716.

BIENVILLE WATER SUPPLY COMPANY	} No. 210. In Equity.
<i>versus</i>	
CITY OF MOBILE ET AL.	

This cause coming on to be heard upon the defendants' motion to dismiss the bill of complaint, and being duly considered by the court, it is hereby ordered that said motion be granted and that said bill of complaint be, and the same is hereby, dismissed out of court at complainant's costs.

Filed June 9th, 1899. Entered minutes, page 716.

RICHARD JONES, *Clerk*.

*Assignment of Error on Appeal of the Bienville Water Supply Company.*

In the Circuit Court of the United States, Southern District of Alabama.

BIENVILLE WATER SUPPLY COMPANY, a Corporation,	}
<i>vs.</i>	
THE CITY OF MOBILE.	

35 Now comes The Bienville Water Supply Company, the appellant, and assigns as errors in the decrees of the United States circuit court for the southern district of Alabama, rendered in this cause on the 22nd day of May, 1899, and on the 9th day of June, 1899, the following:

First. The court erred in sustaining defendant's demurrer numbered one.

Second. The court erred in sustaining defendant's demurrer numbered two.

Third. The court erred in sustaining the defendant's demurrer numbered three.



Fourth. The court erred in sustaining defendant's demurrer numbered four.

Fifth. The court erred in sustaining defendant's demurrer numbered eight.

Sixth. The court erred in sustaining defendant's demurrer numbered nine.

Seventh. The court erred in its decree sustaining defendant's motion to dismiss complainant's bill.

Eighth. The court erred in its order and decree dismissing complainant's bill out of court.

BESTOR AND GRAY AND  
RICHARD H. CLARKE,  
*Solicitors for The Bienville Water Supply  
Company, the Appellant.*

Filed July 12th, 1899.

RICHARD JONES, *Clerk.*

*Petition of the Bienville Water Supply Company for an Appeal to the  
Supreme Court of the United States.*

In the United States Circuit Court for the Southern District of  
Alabama.

BIENVILLE WATER SUPPLY COMPANY	}	No. 210. In Equity.
<i>versus</i>		
THE CITY OF MOBILE.		

36      Petition of complainant to have former order allowing appeal  
         to the circuit court of appeals set aside, and for an order  
         allowing an appeal in the above cause directly to the Supreme  
         Court of the United States.

Comes The Bienville Water Supply Company, a corporation, the complainant in the above-stated cause, by its solicitors, and moves the court for leave to withdraw the *petition* heretofore filed by it therein to be allowed an appeal to the honorable United States circuit court of appeals for the fifth judicial circuit, and that the order of the court granting such appeal be set aside, upon the ground that such appeal should be taken directly to the honorable Supreme Court of the United States; and said complainant, feeling itself aggrieved by the decretal order made by the court on the 22nd day of May, 1899, sustaining defendants' demurrer, and the decree of dismissal made on the 9th day of June, 1899, in pursuance of said order, whereby it adjudged and decreed that the grounds of demurrer of the defendants to complainant's bill numbered one, two, three, four, eight, and nine should be sustained, and that complainant's bill filed in said cause should be dismissed with costs to said complainant, now comes by its solicitors of record and petitions this honorable United States circuit court for the southern district of Alabama for an order allowing said complainant to prosecute an appeal from said final decree of June 9th, 1899, as well as from the decretal order of May 22, 1899, sustaining said demurrers, directly to the honorable



Supreme Court of the United States under and according to the laws of Congress and the statutes of the United States in such cases made and provided, and that also that an order be made fixing the amount of security for costs which complainant shall give and  
 37 furnish upon such appeal, and that upon the giving of such security all further proceedings in this court may be suspended until the determination of said appeal by the Supreme Court of the United States.

Your petitioner, the complainant in this cause, herewith files with this petition assignments of error in this cause.

And, as in duty bound, your petitioner will ever pray, &c.

BESTOR AND GRAY AND

R. H. CLARKE,

*Solicitors for the Bienville Water Supply Company.*

Filed July 12th, 1899.

RICHARD JONES, *Clerk.*

Decree setting aside former order granting appeal to circuit court of appeals and allowing complainant to withdraw petition praying said appeal and allowing an appeal to the Supreme Court of the United States and fixing appeal bond, &c.

In the United States Circuit Court, Southern District of Alabama.

THE BIENVILLE WATER SUPPLY COMPANY, }

Complainant,

*versus*

THE CITY OF MOBILE ET AL., Defendants. }

No. 210. In Equity.

This cause coming on to be heard in open court on the petition of complainant for leave to withdraw the petition heretofore filed by it to be allowed an appeal to the circuit court of appeals for the fifth circuit, and that the order of the court granting such appeal be set aside, and that complainant be allowed to prosecute an appeal directly to the honorable Supreme Court of the United States from the decrees rendered in said cause by this court on the 22nd day of May, 1899, and on the 9th day of June, 1899, respectively, it is considered and ordered by the court that said petition be granted and that said former order of this court allowing the complainant an appeal in this cause to the United States circuit court of  
 38 appeals for the fifth judicial circuit be and the same is set aside.

And it is ordered by the court that said complainant be, and it is hereby, allowed an appeal in said cause directly to the Supreme Court of the United States, as prayed for in its said petition, upon its giving bond for the costs of such appeal in the sum of five hundred dollars.

HARRY T. TOULMIN, *Judge.*

July 12th, 1899.

Filed July 12th, 1899. Minutes, page 723.

RICHARD JONES, *Clerk.*

*Appeal Bond to the Supreme Court of the United States in the Sum of \$500.00.*

In the United States Circuit Court for the Southern District of Alabama.

THE BIENVILLE WATER SUPPLY COMPANY,	} No. 210. In Equity.
Complainant,	
<i>versus</i>	
THE CITY OF MOBILE, Defendant.	

Know all men by these presents that we, The Bienville Water Supply Company, a corporation chartered by the State of Alabama and the complainant in the above-stated cause, as principal, and The Fidelity and Deposit Company of Maryland, of the State of Maryland, as surety, are held and firmly bound unto the said City of Mobile, a municipal corporation of said State, in the sum of five hundred dollars (500.00); for the payment of which, well and truly to be made, we bind ourselves and each of us, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 12th day of July, 1899.

The condition of the above obligation is such that whereas  
 39 lately, at a session of the circuit court of the United States for the southern district of Alabama, in a suit pending in said court upon the equity side thereof between said Bienville Water Supply Company, as complainant, and said City of Mobile, as defendant, certain decrees were rendered against the said complainant by said court sustaining demurrers to its bill of complaint exhibited in said cause and dismissing said bill out of said court; and whereas said Bienville Water Supply Company has obtained from said court an order allowing an appeal to the Supreme Court of the United States from the aforementioned decrees rendered in said cause:

Now, if the said Bienville Water Supply Company shall prosecute its said appeal to effect and shall answer all costs that may be awarded against it if it shall fail to make its said appeal good, then this obligation shall be void; otherwise the same shall remain in full force and effect.

THE BIENVILLE WATER SUPPLY  
COMPANY,

By GEORGE A. KETCHUM,

*President.* [SEAL.]

THE FIDELITY AND DEPOSIT COM-  
PANY OF MARYLAND, BALTIMORE,  
MD.,

By HERMAN W. LEINKAUF,

[SEAL.]  
*Attorney-in-fact.*

D. P. COLEMAN & CO.,

*Local Agents Fidelity and Deposit Company of Maryland.*

[United States documentary stamps.]

Approved:

HARRY T. TOULMIN,

*U. S. Judge.*

Filed July 13th, 1899.

RICHARD JONES, *Clerk.*

40 THE UNITED STATES OF AMERICA, } ss:  
*Fifth Judicial Circuit,*

The President of the United States to the City of Mobile, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at the city of Washington, within thirty (30) days from the date hereof, pursuant to an appeal allowed by the circuit court of the United States for the southern district of Alabama, fifth judicial circuit, wherein The Bienville Water Supply Company is appellant and the said City of Mobile is appellee, to show cause, if any there be, why the decrees in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this the 17th day of July, A. D. 1899.

HARRY T. TOULMIN,  
*United States Judge.*

I hereby, on this 17th day of July, A. D. 1899, accept due personal service of the above citation of appeal on behalf of said City of Mobile, appellee.

B. B. BOONE,  
*Solicitor for the Appellee.*

Filed this the 17th day of July, A. D. 1899.

RICH'D JONES,  
*Clerk U. S. Circuit Court for the  
 Southern District of Alabama.*

41 *Costs Taxed in the Cause.*

Costs of circuit court United States.....	\$61.25
Cost of transcript on appeal to Supreme Court.....	18.75

Total costs and same paid by Bienville Water Supply Company.....	\$80.00
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*Certificate of Clerk to Transcript.*

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Southern District of Alabama, Fifth Judicial Circuit, at Mobile, Alabama.

I, Richard Jones, clerk of said court, do hereby certify that the foregoing thirty-nine (39) typewritten pages, numbered 1 to 39, both inclusive, contain a true copy of the record, assignment of errors, and of all the proceedings had in this court in the cause therein stated, to wit, No. 210, in equity, The Bienville Water Supply Company, complainant, and The City of Mobile *et al.*, defendants, as

fully as the same remains on file and of record in my office as clerk of said court, and that page number forty (40) of this transcript is the original citation of appeal issued in said cause pursuant to an appeal allowed therein by this court.

Witness my hand and the seal of said circuit court of the United States for the southern district of Alabama, affixed at the city of Mobile, this the 26th day of July, A. D. 1899.

[Seal United States Circuit Court, Southern Dist. of Ala.]

RICH'D JONES,

*Clerk U. S. Circuit Court for the  
Southern District of Alabama.*

Endorsed on cover: File No., 17,482. S. Alabama C. C. U. S. Term No., 368. The Bienville Water Supply Company, appellant, vs. The City of Mobile. Filed August 5, 1899.



# In the Supreme Court of the United States

OCTOBER TERM, 1899.

No. 368.

THE BIENVILLE WATER SUPPLY COMPANY,  
Appellant.

VS.

THE CITY OF MOBILE, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE  
UNITED STATES FOR THE SOUTHERN  
DISTRICT OF ALABAMA.

BRIEF OF APPELLANT ON MOTION OF APPELLEE  
TO DISMISS OR AFFIRM.

Counsel for appellee has made a motion in this Honorable Supreme Court of the United States to dismiss or affirm under Rule 6, subdivision 5 of this court. This rule provides that such motion must be "on the ground that although the record may show that this court has jurisdiction, it is *manifest* the writ of error or appeal was taken for *delay only*, or that the question on which the jurisdiction depends is *so frivolous* as not to need further argument."

That this court has jurisdiction is manifest.

The bill is filed to restrain the city under powers derived from the Legislature from violating its contract with appellant under Article 1, Section 10, of the constitution of the United States, which reads as follows :

"No state shall—pass—any law impairing the obligation of contracts."

Then it must be manifest that the appeal was taken—First, for *delay only*; or second, that the question of impairing or violating its contract is *so frivolous* as not to need further argument.

First. How can it be plausibly contended under the facts as stated by the bill, that the appeal is taken for *delay only*? The contract with the city will expire in July, 1900, or in less than one year. The application for an injunction or restraining order has been denied by the court and the bill has been dismissed by the United States Circuit Court. No damage has been done or can be done to the city by delay. It is left free to proceed to sell water under its Stein's system of water-works and to erect other water-works, and is so doing in both instances, not at all impeded or interfered with by appellant. Then how can the city be injured, or the Bienville Water Supply Company benefitted in any way by a delay until the cause can be regularly reached and heard by this court?

If there were a moneyed decree against the Bienville Water Supply Company; or a restraining order, or an injunction against the city, or any other process from the court by which the city could be injured by delay or time, then such motion might be entertained by the court. The record shows that all costs have been paid by the appellant, nothing has been accomplished by its bill, no harm has been or is being done to the city, so the proposition that the appeal was taken for "*delay only*" is not sustained by any of the facts of this cause.

Second. Then is the question on which the jurisdiction depends "*so frivolous* as not to need further argument?"

It is settled that the motion to affirm will not be entertained unless there is a color of right to the motion to dismiss.

Davis vs. Corbin, 113 U. S., 687.

Ackley School District vs. Hall, 106, U. S., 428.

Micas vs. Williams, 104 U. S., 556.

Hinckly vs. Morton, 103 U. S., 764.

Whitney vs. Cook, 99 U. S., 607.

We contend that there is no color of right for the dismissal of this cause.

Should the court, however, be of the contrary opinion and should further *entertain* the motion to affirm, then we beg leave to present the following in opposition to the granting of such motion.



The city, after having made this contract with the Water Supply Company, and while it is in full force and while the city admits that the Water Supply Company has complied with all of the provisions of the contract, gets possession of another water-works (Stein water-works), is running this water business, selling water to customers, cutting the rates established by and between the city and appellant, and actively competing with this Water Company for selling and furnishing water to customers, besides, reducing the rates, thus taking away some of the customers of the appellant and materially reducing its income, and rendering the Water Company unable to meet the interest on its bonded indebtedness. The investors of \$750,000 will poorly be paid by the city paying for 265 hydrants at \$50 an hydrant, to wit : \$13,250 per annum. The amount a city pays for the use of water for itself as a city, is known not to pay capitalists for such large investments. To supply water for all public buildings, fountains, &c. (as alleged by the bill) free and then to supply the fire department for pay, is no inducement to capitalists to so invest their money. This is a loss. The main inducement is in obtaining the franchise, or right to supply private consumers at private rates. The maximum rates to be charged by appellant are fixed by the charter of the company and less rates are fixed by the contract with the city.

Then is it not a violation of the contract, when the city ruins the income of the Water Company by actively competing with it in selling water to customers and cutting the rates it had agreed upon with the Water Company to be charged its citizens? Is it not the spirit and equity of the contract that it should not be thus violated and did not the Water Company have the right to expect it to be fairly carried out so that it could make some money and not be ruined by the city?

In the case of the Bienville Water Supply Company vs. the City of Mobile, 112 Alabama Reports, page 260,—where the city had refused to pay its water bill and the company had threatened to cut off the water, and the city had obtained an injunction against the Water Company to prohibit it from cutting off the water, Chief

Justice Brickell, in his opinion says—"Treating the case as controlled by the principles applicable to ordinary bills for specific performance, it is insisted by the demurrers, first that the contract providing as it does for the performance of continuous duties extending over a series of years, duties involving personal labor and skill, is not one which a court of Equity will superintend or specifically enforce."—"If the bill be of the character asserted in the first contention, it would be wanting in equity and should be dismissed"—"But the company also owes a duty to the public. Neither it nor the city would be permitted summarily and without making some other provisions for the safety of the public to shut off the water. *We judicially know* that contracts of this character once entered upon become, in a sense *perpetual*."

112 Alabama, page 264, 265.

This is the construction placed upon this contract and these obligations between appellant and the appellee by the Supreme Court of Alabama.

The further authorities we rely upon as sustaining our contention are :

Walla Walla Water Co. vs. Walla Walla, 172 U. S., page 1.

White vs. City of Meadville, 177 Penn., 595.

Wilson vs. Borough of Rochester, 180 Penn., 59

Atlantic City Water Works vs. Atlantic City,  
39 N. Jersey Equity, 367 ; 48 N. Jersey  
Law, 378.

Fergus Falls Water Co. vs. Fergus Falls, 65  
Fed. Rep., 586.

See also charter of the Bienville Water Supply  
Company, Preamble and Sections 6, 7, 11,  
12, 14, 15, 16—Acts of Ala., 1882-83, page 452.

Besides, the city had no constitutional power to engage in the business of merely selling water to others for profit, as it is doing in running the Stein Water Works, without supplying water for its own use.

Constitution of the State of Alabama, Article I,  
Section 37, Article 4, Sections 50, 54 and 55.

The authorities cited by appellee on the motion to dismiss or affirm are as follows :

*Metcalf vs. Alaska*, 130 U. S., 201.

This court decided that the United States District Court and the United States Circuit Court had no admiralty jurisdiction to try a libel suit for damages for the loss of lives. As the same question had been previously passed upon and decided by this court in the *Harrisburg* 119 U. S., 199, this court affirmed the decree in the lower court because the "appeal was taken for delay only." Most probably to get a compromise.

In *Northern Pacific Railroad Company vs. Amato*, 144 U. S., 465. This case was where a judgment had been rendered by a jury for \$4000. As this court determined that the question of the amount of damages to be assessed was one for the jury alone to pass upon and that the writ of error was taken for delay only it affirmed the judgment. The delay damaged the one-legged employee of the railroad by keeping him out of his money, without any color of right.

In *Wilson vs. North Carolina*, 169 U. S., 586, Wilson, a railroad commissioner for the State had been removed from office by the Governor of the State. The case had gone to the Supreme Court of the State, and been there decided against Wilson. Wilson brought a writ of error to this court. This court decided on motion to dismiss the case for want of jurisdiction, as the Supreme Court of the State had already decided it, that there was no federal question in it, and dismissed it.

In *Chanute City vs. Trader*, 132 U. S., 210, a judgment was recovered for damages and costs in the United States Court on bonds and coupons issued by a municipal corporation. Three and a half years thereafter a writ of mandamus to compel the municipal corporation to levy a tax to pay these bonds and coupons was moved for and granted. From this order an appeal to this court was taken. Under these facts—this court says—"There does not appear to be any ground for contending that this court has no jurisdiction; yet we are entirely satisfied that the reasons assigned for taken the writ of error are

frivolous and that it was taken for delay only." 132 United States, 214.

This delay damaged the judgment creditor by keeping him out of his money, and as there was no grounds for the writ of error, this court affirmed the judgment on motion, of course.

In the case of *Douglas vs. Wallace*, 161 United States, 346.

This was a suit against a United States Marshal on drafts drawn on him by a United States Deputy Marshal, and assigned to Wallace. These drafts were accepted by the United States Marshal as follows: "Accepted payable when I receive funds to the use of" the drawer of the drafts. The suit was instituted against the United States Marshal in the State Court and judgment obtained. This judgment was affirmed by the Supreme Court of North Carolina. A writ of error was then sued out to this United States Court. This court affirmed the judgment because it considered the writ of error merely taken for delay.

Here again some damage was done to Wallace by this delay, and thus holding up the execution of the judgment.

All these authorities cited present facts very different from this case at bar, and all the other decisions of this court which we have been able to find where the case was dismissed or affirmed on motion, present causes, either on which this court decided that it had no jurisdiction, or where the writ of error was so plainly for delay, which delay damaged the appellee, that the court considered it frivolous.

But says counsel for appellee, "In the case at bar it is sought by this appeal to put clogs in the wheel of progress—the building of a great public work expressly authorized by a sovereign State of the Union."

If we have any rights, we can only appeal to this court to get them. The "wheels of progress" as often so loudly appealed to, have already ridden over justice and

crushed out property too much in many of the States and municipalities, after the capital had been invested.

We respectfully ask that the motion may be denied.  
All of which is respectfully submitted by

D. P. BESTOR,

R. H. CLARKE,

Counsel for Appellant.



In

THE

BOOK





# In the Supreme Court of the United States

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OCTOBER TERM, 1899.

No. 368.

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THE BIENVILLE WATER SUPPLY COMPANY,  
Appellant,  
VS.  
THE CITY OF MOBILE, et al., Appellees.

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BRIEF OF APPELLEE ON MOTION TO DISMISS  
OR AFFIRM.

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## STATEMENT OF THE CASE.

The bill in equity in this cause was filed in the Circuit Court of the United States, Fifth Judicial Circuit, Southern District of Alabama, on February 21st, 1899, by the appellant against the appellees and sought to enjoin the City of Mobile from erecting, constructing or operating a system of water works to be owned by said city, and from operating what is known as the Stein or Mobile City Water Works, which the City of Mobile had acquired. An injunction was asked upon the ground that such action upon the part of the City of Mobile was or would impair the obligation of certain contracts entered into by and between the City of Mobile and the Bienville Water Supply Company, in violation of Article 1, Section 10, of the Constitution of the United States.

The original contract, of which the other was and is an extension, was entered into by the parties on August 15th, 1888, and was extended by a subsequent agreement entered into between said parties on April 14th, 1891, which latter instrument, according to its terms, extended the original contract until July 1st, 1900. These contracts

are made a part of the bill as Exhibits "A" and "B." (Record, pages 5-11.)

The said contracts made a part of the bill, show that the only obligation resting upon the City of Mobile is to pay for two hundred and sixty (260) fire hydrants at the rate of fifty dollars per hydrant, per annum, payments to be made monthly. (Record, pages 8 and 11.)

There is no averment in the bill that the City of Mobile has refused to pay for said hydrants according to the terms of the contract, or that it intends in the future to repudiate its obligation to make said payments.

The bill shows that the Bienville Water Supply Company, the appellant, was chartered under an act of the General Assembly of Alabama, and that it was thereby charged with the duty of introducing into the Port of Mobile such supply of pure water as the domestic, sanitary and municipal wants thereof might require, and for this purpose it was authorized to construct all needed canals, ditches, and by pipes and aqueducts as might be found best for the purpose, etc. (Record, page 1.)

The appellees demurred to the bill upon the principal ground, among others, that the bill failed to allege or show any violation or impairment of the contracts on the part of the City of Mobile. (Record, page 13.) The court sustained the demurrer of the appellees and allowed the appellant fifteen days in which to amend its said bill as it might be advised. (Record, page 21.) The appellant failing to amend its said bill within the time allowed by said order or decree of the court, it was on the motion of the appellees, by a decree of the court on June 9th, 1899, dismissed. (Record, page 22.)

#### ARGUMENT.

We contend that an examination of the record will show that the opinion of Judge Toulmin (Record, pages 15-21) to the effect that the bill of appellant fails to allege anything whatever which tends to show that the City of Mobile has or intends to violate or impair its contract with the appellant, is clearly correct. The bill shows that the appellant did not derive any authority or power to construct or operate its water works from the

City of Mobile, and that the power was obtained by it from the State of Alabama. The charter of the appellant also shows that the State of Alabama in the act creating the appellant, fixed the maximum rates the company was authorized to charge for water supplied to the inhabitants of the City of Mobile. See Section 14 of the charter of the Bienville Water Supply Company printed in the appendix to this brief. The bill avers that the City of Mobile was authorized to build and operate a system of water works under certain acts of the General Assembly of Alabama. Copies of which said acts are appended to this brief. These acts are public statutes of which courts take judicial notice and neither the contents nor the substance of such statutes need be set forth or recited in a pleading. *Smith vs. Tallopoosa Co.*, 2 Woods, (U. S.) 574; 23 American & English Ency of Law, 1 Ed., page 286. The bill does not allege that the appellant has an exclusive privilege of furnishing the City of Mobile and its inhabitants with water. The bill shows (Record, page 1,) that all the parties to this suit are citizens of the State of Alabama. The jurisdiction of the Circuit Court was sought to be obtained by an averment in the bill that the acts and doings of the City of Mobile in constructing and operating water works of its own was violating and impairing its contract with the Bienville Water Supply Company, the appellant.

We submit that if our contention, and the conclusion of the court below, is correct, that the bill shows nothing done or suffered or intended to be done or suffered by the City of Mobile to impair or violate its contracts with the appellant, then it must follow that as soon as that proposition is made manifest, no federal question remains and that the Circuit Court and this honorable court are without jurisdiction. If a motion had been made to dismiss the bill because it did not show that the Constitution of the United States had been or was contemplated being violated by the parties defendant, and the court upon examination of the bill had found such to be the truth, would not an order dismissing the bill have been proper? Surely there is enough color for this motion to dismiss, as will warrant this honorable court in enter-

taining the alternative motion of the appellees to affirm.

Metcalf vs. The Alaska, 120 United States, 210.

Northern Pacific R. R. Co. vs. Amato, 144 United States, 465.

We think what was said by this court in Wilson vs. North Carolina, ex rel Caldwell, 169 United States, 586, aptly appropriate to the case at bar. Mr. Justice Peckham said: "Upon the case made by the plaintiff in error, the federal question which he attempts to raise is so unfounded in substance that we are justified in saying that it does not really exist; that there is no fair color for claiming that his rights under the federal constitution have been violated," and we add thereto, in this cause by impairing the obligation of an existing contract. See also Craemer vs. State of Washington, 168 U. S., at page 131, *McCain vs. Des Moines* 174 U.S. 168.

In the City of Chanute vs. Trader, 132 United States, 210, this court affirmed a judgment, on a motion to dismiss or affirm, upon the ground that the reasons for taking the writ of error were frivolous and taken for delay only, affirming the judgment notwithstanding it had jurisdiction. The contracts in question made a part of the bill contain nothing to show that the City of Mobile agreed with the Bienville Water Supply Company that it should furnish water to the inhabitants of the City of Mobile, or that said city granted to the said Water Company *the right to furnish water* to its inhabitants during the term of the contract (that was done by the General Assembly of Alabama and accepted by the Water Company) nor that the City of Mobile agreed in said contract not to build or acquire water works of its own while the contract between it and the appellant existed. The contracts made a part of the bill (Record, pages 5-11.) make it plain that the City of Mobile did not grant to the Bienville Water Supply Company any rights or privileges whatever. The General Assembly of Alabama granted to appellant the right to construct its water works, to use the streets of the City of Mobile for that purpose, and fixed the maximum rates the said Water Company was to charge the inhabitants of the City of Mobile for water, and also empowered said Water Com-

pany to make all needful rules and regulations relating to the supply and use of water. See copies of Sections 6, 7 and 14 of the charter of the Bienville Water Supply Company printed in the appendix to this brief. The General Assembly of Alabama in the charter of the appellant also authorized it and the City of Mobile to contract together for supplying said municipal government with water. See Section 16 of Bienville Water Supply Company's charter printed in the appendix to this brief. In the contract in question it was stipulated that the appellant should not charge for water supplied to the citizens of Mobile more than certain maximum rates. The contract does not fix the rates, merely prescribes a maximum. The City of Mobile agreed to pay appellant fifty dollars per annum for each of two hundred and sixty (260) fire hydrants, payments to be made monthly, and we insist that when this is done said city meets all that is required of it under the contract. There is absolutely no averment whatever that the appellee has failed or refused to make the payments, or that it intends not to make the said payments in the future during the existence of the contract. The case of the City of Walla Walla vs. the Walla Walla Water Works, 172 United States, 1, is entirely dissimilar to the case at bar. In that case the city had the right to grant the use of the streets of the City of Walla Walla for the purpose of laying pipes to furnish the inhabitants of said city with water, to any person or association of persons, for the term of twenty-five years. The City of Walla Walla was also authorized under its charter to erect and maintain water works within or without the city limits, or the power to grant the right to erect and maintain water works to other persons or corporations for the purpose of supplying the City of Walla Walla or its inhabitants with water. In the statement of that case by Mr. Justice Brown it is shown, that an ordinance was adopted by the city council of Walla Walla and accepted by the Water Company, granting to such company "for a term of twenty-five years the right to place and maintain all necessary water mains, pipes, connections and fittings in all of the highways, streets and



alleys of said city, for the purpose of furnishing the inhabitants thereof with water." Under the provisions of section seven (7) of said ordinance the City of Walla Walla bound itself not "to erect, maintain or become "interested in any water works except the ones herein "referred to, save as hereinafter specified." Section eight (8) of said ordinance gave the City of Walla Walla the right at any time to take the water works of the Walla Walla Water Company by condemnation proceedings. No such provisions are to be found in the contracts made a part of the bill in this cause. The City of Mobile did not grant an exclusive or any other kind of privilege to the Bienville Water Supply Company, nor did it in its contracts with that company bind itself not to erect, maintain or become interested in water works. Under the constitution of Alabama as construed by the Supreme Court of Alabama in the case of Birmingham and Pratt Mines Railway Company vs. Birmingham Street Railway Company, 79 Alabama at pages 473-475, the City of Mobile and the General Assembly of Alabama had and have no power to grant an exclusive privilege or right. This court has again and again announced that it would follow the construction put upon the constitution of a State by its highest court.

Polk vs. Wendell, 9 Cranch, 89.

Wade vs. Walnut, 105 United States, 1.

Fall Brook Irrigating District vs. Bradley, 164 United States, 112

The learned Judge (Toulmin) of the Circuit Court, after reviewing all of the cases cited by the appellant, in concluding his opinion in the case at bar, said: "Thus "we have seen that the contract in every case, to which "our attention has been called, either provided for an "exclusive right in the Water Company to supply to the "city and its inhabitants, granted or contracted for by "the city, or contained in a covenant by the city that it "would not erect water works of its own, and would abstain from granting the right to do so to a competing "company during the life of the contract. And we have "seen that the contract under consideration in this case "contains no such provisions. We have seen that it

“does not attempt to grant any exclusive right to complainant; that it contains no stipulation or agreement that the complainant shall furnish water to the inhabitants of the City of Mobile, and no covenant by the city that it will not build or acquire water works of its own, or abstain from supplying water to its inhabitants during the continuance of the contract. The parties might have made such a contract but they did not do so.”

The proposition that a man who has a house leased from another, cannot lawfully begin to build a house of his own until the expiration of his lease with the other man, is just as reasonable as the claim that the City of Mobile under its contract with the appellant, cannot be lawfully permitted to erect its own water works, even though it pays every cent that it is obligated to pay under the contract.

We feel convinced that an examination of the record will make it clear that if there ever was a case to apply the principles laid down by this court in the *City of Chanute vs. Trader*, 132, at page 214, this case at bar is one. In that case Mr. Justice Blatchford, for the Court, said: “If the prosecution of writs of error to the execution of process to enforce judgments is permitted when no real ground exists therefor, such interference might become intolerable. This Court, in the exercise of its inherent power and duty to administer justice ought independently of sub-division 5 of rule 6, to reach the mischief by affirming the action below.” See also *Douglas vs. Wallace*, 161 U. S., 348. In the case at bar it is sought by this appeal to put clogs in the wheel of progress—the building of a great public work, expressly authorized by a sovereign State of the Union.

All of which is respectfully submitted.

B. B. BOONE,  
E. L. RUSSELL,

Counsel for Appellee.

## APPENDIX.

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[ACTS OF ALABAMA, 1882-3, PAGES 452, 453, 456, 457.]

No. 230.)

AN ACT.

H. B. (717.

To incorporate the Bienville Water Supply Company.

Section 6. Be it further enacted, That said corporation is hereby charged with the duty of introducing into the Port of Mobile and the Village of Whistler, in Mobile County, such supply of pure water as the domestic, sanitary and municipal wants thereof may require. And for this purpose said corporation is hereby authorized to construct all needed canals and ditches, and by pipes and aqueducts, as may be found best suited for the purpose, to carry into said towns, by such line or route as may be found best, such water as may be needed, from any point in said county within twenty miles of said Port or City of Mobile. In the laying of its pipes and the construction of aqueducts when required, said corporation is hereby authorized to use, free of charge, any and all public roads of the county, and the streets of said towns, free of charge; but when its pipes are laid in or under said roads or streets, or its other works completed, said corporation shall, without delay, restore said roads and streets to their original condition for use as public highways and thoroughfares, and to perform the public duty hereby declared, and by the acceptance of this charter imposed upon it. Said corporation shall have the right to enter upon any land of private persons, and therein and beneath the surface thereof, to lay pipes for the conveyance of said water, and thereafter repair and maintain the same; but said corporation shall not enter upon any private lot in said towns, without the consent of the owner thereof, and before entering on any private property, must first pay to the owner thereof, such reasonable compensation for its use of said land for the purpose herein declared, as may be agreed upon with said owner, or in case of disagreement, as may be ascertained upon pro-

ceedings for that purpose, as directed by law, for the condemnation of private property, or the use thereof to public use.

Sec. 7. Be it further enacted, That for the supply tubes or pipes leading from the main or large pipes in the streets or roads to the houses or other places where the water is required for use, and for the hydrants and other appliances connected therewith, said corporation shall be entitled to have and demand from the person or persons requiring the water, the reasonable cost thereof, and of fixing and adjusting the same, and said corporation shall have authority to make all needful rules and regulations relating to the supply and use of said water.

Sec. 14. Be it further enacted, That said corporation be and the same is hereby authorized to demand and receive for compensation for the supply of water it may furnish, at not exceeding the following rates, to be paid by the person receiving the water, and in advance, that is to say, for every family consisting of six persons, or less, not more than twenty dollars per annum, and two dollars per annum for every person additional, two children under twelve years of age, to be estimated as two for one. For retail grocery stores where liquors are not retailed, twelve dollars per annum; for retail grocery stores where liquor is retailed, from twenty to fifty dollars per annum; for liquor stores doing the business of drawing off and bottling wines or other liquors, from thirty to seventy-five dollars per annum; for stores without families, or for offices, twelve dollars per annum; for baths for private families, five dollars per annum; for a horse, five dollars per annum; for a buggy or carriage, three dollars per annum; for the use of ships and steamboats, vessels and other water crafts, per hogshead of one hundred and twenty gallons, (50c) fifty cents per hogshead. Coffee houses, oyster saloons, confectioneries, manufactories, hoteis, taverns, boarding houses, steam mills, tan yards, brick yards, soda water stands, livery stables, public baths, public or private fountains, baking, dyeing, scouring and renovating establishments, and other places of business not herein enumerated, may be supplied at an annual charge, according to the quantity

of water which may be required, on such terms as may be agreed upon.

Sec 16. Be it further enacted, \* \* \* \*  
And the Bienville Water Supply Company, and the municipal authorities of the Port or City of Mobile, may contract with each other, on such terms as they can agree upon, for the employment by said company, of apparatus or appliances of their own in connection with said water works, for the extinguishment of fires or for other public purposes, but the existing police board shall not, by anything in this act contained, be empowered to levy, demand or collect any other or additional taxes than they are now by law empowered to levy, demand and collect.

Approved February 19th, 1883.

(ACTS OF ALABAMA, 1898-9, PAGES 19-21.)

No. 9.

AN ACT

H. No. 47.

To authorize the City of Mobile to provide, maintain and operate systems of waterworks and sewerage.

WHEREAS, it is provided by an Act entitled "An Act to provide a Charter for the City of Mobile," approved February 6th, 1897, section twenty-one, that the General Council of said city has the right to contract for, build, or purchase, or otherwise acquire, public works subject to the approval of the majority vote of the citizens of Mobile at a special election called therefor; and,

WHEREAS, at a special election duly called and held in the City of Mobile, on the 2d day of August, 1897, the Mayor and General Council of the City of Mobile was, by a majority vote of the citizens of Mobile, authorized to contract for, purchase, build, or otherwise acquire a system of water works to be owned by said City of Mobile, to cost not exceeding five hundred thousand dollars (\$500,000), and a system of sewerage to be owned by said City of Mobile, to cost not exceeding two hundred and fifty thousand dollars (\$250,000), payment to be

made for said works by issuing bonds, and securing the same by a mortgage upon said public works ; and,

WHEREAS, it is deemed desirable to empower said city to build, purchase, or otherwise acquire and maintain and operate said systems of water works and sewerage so authorized by a majority vote of the citizens of said city ; THEREFORE,

Section 1. BE IT ENACTED by the General Assembly of Alabama, that the Mayor and General Council of the City of Mobile be and it is hereby authorized and empowered to buy, or to build, erect and maintain, and to operate water works for the supply of its inhabitants with water, for the extinguishment of fires and for sanitary, domestic and other purposes ; and said Mayor and General Council of the City of Mobile is also hereby authorized and empowered to buy, or to build, erect, and maintain and operate a system of sewerage for the use of said city and its inhabitants.

Sec. 2. BE IT FURTHER ENACTED, That full power be and is hereby given to said Mayor and General Council to enter into and make all needful contracts for acquiring a location or locations for machinery and stand-pipes, reservoirs, pumps, pipes, hydrants and valves, buildings, and all other parts of such system of water works ; and also for laying sewer pipes, syphons, manholes, flush tanks, pumping engines, and all other parts of such system of sewerage and also for rights of way for the erection of said water works and said sewerage systems, and for this purpose full power and authority is hereby given to said Mayor and General Council to use any and all of the streets or alleys of the City of Mobile, and any or all of the public roads of Mobile County, and in the event said Mayor and General Council are unable to contract for other rights of way, or the land necessary for securing a location or locations for stand-pipes, reservoirs, pumps, buildings, and all necessary machinery needed in erecting and constructing water works and sewerage systems authorized by this Act, the said Mayor and General Council is hereby authorized and empowered in order to obtain the same and the water supply for its stand-pipes, reservoirs, pipes,



sluice ways and canals, to condemn the waters of any stream, creek, spring or river and the lands adjacent thereto, and also the lands forming what is known as the water-shed, if the same are situated in Mobile County, by the exercise of the rights of eminent domain in the manner provided by law for the condemnation of land for public uses, provided, however, that nothing in this section shall be applied or be construed to fix a limit of time within which said Mayor and General Council shall exercise the rights of eminent domain herein conferred, and provided further, that the provisions of this section shall not apply or be construed to authorize said Mayor and General Council to condemn or appropriate to the use of said water works the water in what is known as Clear Creek, in said Mobile County.

Sec. 3. BE IT FURTHER ENACTED, That the said Mayor and General Council shall, and it is hereby invested with full authority and power to make all proper regulations for preserving, maintaining, and operating such water works and sewerage systems when established, and to collect such rates for waters supplied and for the use of said sewerage system as shall be sufficient to pay the interest on any bonds issued by said city for the purpose of providing said water works and sewerage systems, and the expenses necessary for operating the same, and to collect the dues for water so supplied and used, and for the use of said sewerage system and to apply the same to the payment of such interest, provided that such rates shall not exceed the usual and customary rates charged by other cities similarly situated for like service, and the Mayor and General Council shall be and it is hereby authorized and empowered to extend such water works and sewerage systems in any part of the County of Mobile it may deem proper, and in such event all the powers conferred upon and given to the said Mayor and General Council shall apply to such portions of such water works and sewerage systems.

Sec. 4. BE IT FURTHER ENACTED, That the said Mayor and General Council are hereby authorized and empowered to buy or to build, erect, and maintain

said water works ; and said Mayor and General Council is also hereby authorized and empowered to buy, to build, erect and maintain and operate said system of sewerage without holding a special election for the approval of the purchasing or building of said water works and said sewerage systems by the majority vote of the citizens of Mobile.

Sec. 5. BE IT FURTHER ENACTED, That this act shall take effect and be in force on and after its passage.

Approved November 30th, 1898.

[ACTS OF ALABAMA, 1898-9, PAGES 16-18.]

No. 8

AN ACT

H. 48.

To authorize the City of Mobile to make and issue bonds for building, purchasing or otherwise acquiring systems of water works and sewerage for the said city, and to mortgage said works to secure said bonds.

WHEREAS, it is provided by an act entitled "An act to provide a charter for the City of Mobile ; approved February 6th, 1897, Section 21, that the General Council of said city has 'the right to contract for, build, purchase or otherwise acquire public works subject to the approval of the majority vote of the citizens of Mobile at a special election called therefor,'" and

WHEREAS, at a special election duly called and held in the City of Mobile on the second day of August, 1897, the Mayor and General Council of Mobile were, by a majority vote of the citizens of Mobile, authorized to contract for, purchase, build, or otherwise acquire a system of water works to be owned by said City of Mobile, to cost not exceeding five hundred thousand dollars (\$500,000,) and a system of sewerage to be owned by the said City of Mobile, to cost not exceeding two hundred and fifty thousand dollars, (\$250,000) payment to be made for said works by issuing bonds and securing the same by a mortgage upon said public works, and

WHEREAS, it is deemed desirable to authorize and empower the City of Mobile to make and issue bonds to enable the Mayor and General Council of the City of Mobile to provide the public works so authorized and to give the mortgage so authorized by a majority vote of the citizens of said city:

THEREFORE, (Section 1.) Be it enacted by the General Assembly of Alabama, That the Mayor and General Council of the City of Mobile be and they are hereby authorized and empowered to make and execute bonds of the City of Mobile to an amount not exceeding seven hundred and fifty thousand dollars (\$750,000) with interest, payable semi-annually, as evidenced by coupons attached to said bonds at such place or places as may be designated therein, and to sell and issue the same and apply the proceeds arising therefrom to the building, purchasing or otherwise acquiring a system of water works, and a system of sewerage for said city, the proceeds not exceeding five hundred thousand dollars, (\$500,000) face value of said bonds to be applied to the building, purchasing or otherwise acquiring said system of water works, and the proceeds of not exceeding two hundred and fifty thousand dollars, (\$250,000) face value of said bonds, to be applied to the building, purchasing or otherwise acquiring the said system of sewerage as authorized by said majority vote of the citizens of Mobile. Said bonds are to run such time, not exceeding forty years from the date of said bonds, and to bear such interest, not exceeding four and one-half per centum per annum, as may be determined upon by said Mayor and General Council. And the said bonds and coupons for interest thereon shall be negotiable paper, and may be made payable to bearer, and when issued are to be designated as "City of Mobile Water Works and Sewerage Bonds." Said bonds shall be issued under the corporate seal of said City of Mobile, and none of said bonds shall be of a lower denomination than one thousand dollars, or shall be sold or disposed of by the said Mayor and General Council at less than par. Said bonds shall be of such form and contain such provisions consistent with the

provisions of this act as may be determined upon by said Mayor and General Council.

Sec. 2. Be it further enacted, That the said Mayor and General Council be and they are hereby expressly authorized and empowered to mortgage or convey by deed of trust said water works and said sewerage system to secure the payment of such bonds, and the interest thereon, as may be issued under and pursuant to this act, and the said mortgage, or deed of trust, may be made to such trustee as said Mayor and General Council may select, and shall convey any and all property constituting a part of, or used in connection with said water works or sewerage systems, whether owned at the time of the execution and delivery of said mortgage or acquired thereafter, and said mortgage or deed of trust shall contain such provisions not inconsistent with the provisions of this act as may be determined upon by said Mayor and General Council.

Sec. 3. Be it further enacted, That after the lapse of ten years from the issuance of said bonds (unless said Mayor and General Council elect to have the sinking fund become operative at an earlier date) after paying the operating expenses of the said works, the interest on said bonds outstanding, and any repairs and extensions that may be deemed expedient by said Mayor and General Council, there shall remain any surplus in any one year there shall be created with such surplus of net revenue that may be so had, and in each year from year to year, a sinking fund which shall be deposited in the First National Bank of Mobile, and when said fund aggregates the sum of five thousand dollars (\$5,000) said bank shall advertise for the lowest bid from the holders of such bonds, to surrender the same to said sinking fund for payment and cancellation.

Sec. 4. Be it further enacted, That if the income derived from the water works and sewerage system aforesaid is insufficient to pay the operating expenses and the interest upon the said bonds, issued under and pursuant to the terms of this act, any deficiency must be made up and paid up from the general revenue of the City of Mobile.

Sec. 5. Be it further enacted, That the bonds issued under and pursuant to this act, and the interest thereon, shall be exempted from any and all taxes which may be imposed by the City of Mobile.

Sec. 6. Be it further enacted, That said Mayor and General Council are hereby authorized and empowered to issue and sell the said bonds as provided for in this act, without holding a special election for the approval of the issuance of said bonds by the majority vote of the citizens of Mobile.

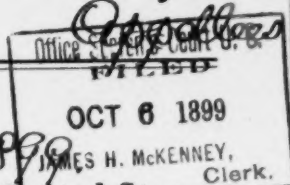
Sec. 7. Be it further enacted, That this act shall take effect and be in force on and after its passage.

Approved Nov. 30th, 1898.



No. 368.

Reply By. of Boone & Russell for



*Filed Oct. 6, 1899*  
In the Supreme Court of the United States

OCTOBER TERM, 1899.

No. 368.

THE BIENVILLE WATER SUPPLY COMPANY,  
Appellant,

VS.

THE CITY OF MOBILE, et al., Appellees.

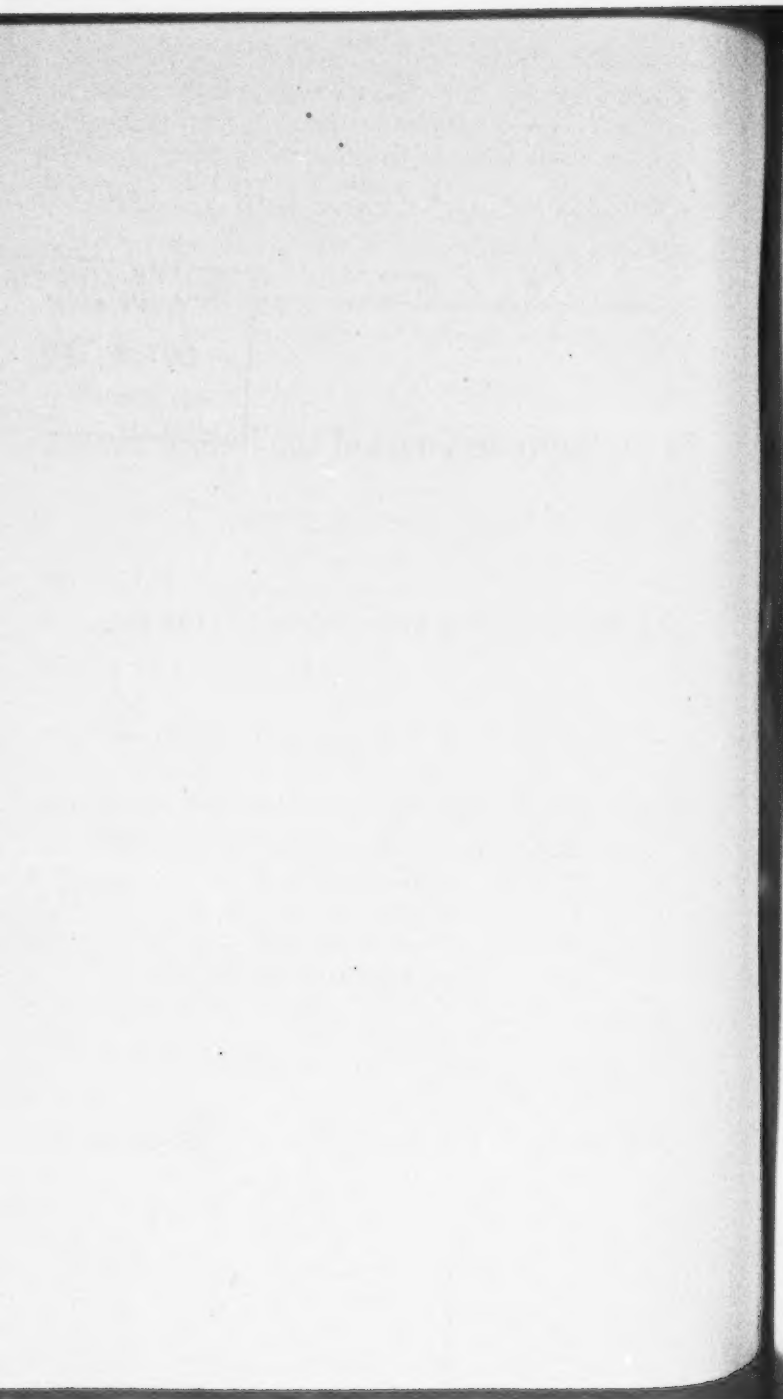
BRIEF OF APPELLEES IN REPLY TO BRIEF OF  
APPELLANT, UPON MOTION TO DISMISS  
OR AFFIRM.

B. B. BOONE,

E. L. RUSSELL,

Attorneys for Appellees.





# In the Supreme Court of the United States

OCTOBER TERM, 1899.

No. 368.

THE BIENVILLE WATER SUPPLY COMPANY,

Appellant,

VS.

THE CITY OF MOBILE, et al., Appellees.

## BRIEF OF APPELLEES IN REPLY TO BRIEF OF APPELLANT, UPON MOTION TO DISMISS OR AFFIRM.

In reply to the contention of the appellant's counsel as set out at the bottom of page 4 of their brief, that the City of Mobile had no constitutional power to operate the Stein or Mobile City Water Works, we beg leave to submit the following :

The right to acquire the Stein Water Works was conferred upon the City of Mobile by the General Assembly of Alabama by act of January 7th, 1841, ratifying a certain contract entered into between Albert Stein and the City of Mobile, passed upon by this Court in *Stein vs. Bienville Water Supply Company*, 141 United States, 67. This act of the General Assembly was passed thirty-four years before the adoption of the present Constitution of Alabama of 1875, and vested by contract certain rights in the City of Mobile which cannot be divested by any change in the organic law of the State, even if the sections of the present constitution of Alabama have, which we deny, the effect claimed by appellant's counsel.

See the decision of Chief Justice Field in *Grogan vs. San Francisco*, 18 California, 590-612.

*Town of Pawlet vs. Clark*, 9 Cranch, 292; *Mount Hope Cemetery vs. City of Boston*, 158 Mass., 509; same case, 35 American State Reports, 515, and elaborate note by A. C. Freeman; *New Orleans Water Works Company vs. Rivers*, 115 United States, 674.

All of which is respectfully submitted.

B. B. BOONE,

E. L. RUSSELL,

Attorneys for Appellees.

Counsel for Parties.

## BIENVILLE WATER SUPPLY COMPANY v. MOBILE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE  
SOUTHERN DISTRICT OF ALABAMA.

No. 368. Submitted October 10, 1899. — Decided November 6, 1899.

The Bienville Water Supply Company was a corporation organized under the laws of Alabama, and was authorized thereby to build water works in Mobile and to use the streets of that city for water purposes. The city and that company were authorized to contract together for the purpose of supplying the city with water. In the contract made between them under this authority there was no express provision for furnishing the inhabitants of the city with water, and no stipulation by the company that it would do so, though it was clear that the parties contemplated that the company would contract with the inhabitants to supply them with water for domestic purposes. The city was also authorized by the legislature to build or otherwise acquire water works of its own to supply water to itself and its inhabitants for the extinguishment of fires, and for sanitary and domestic purposes, and in its contract with the Bienville Company the city did not agree not to do so. It did agree to pay the company monthly for a certain number of hydrants supplied by it, but there was no averment on the part of the company that the city had repudiated said obligation or refused to make such stipulated payments, or intended to do so. The company filed a bill in equity against the city to enjoin it from making or carrying out any other contract for supplying water to its inhabitants, or for constructing a system of water works for that purpose during the continuance of said contracts and from building or acquiring a system of water works to bring water into the city during such continuance. To this bill the city demurred. The bill was dismissed. Appeal being taken to this court, a motion was made to dismiss it, joined with a motion to affirm. *Held*, that as there were no facts averred showing that the city had violated, was violating, or intended to violate its contracts with the Bienville Company, and as there was no legislation to that end, the bill was properly dismissed in the court below; and as there was color for the motion in this court to dismiss, the motion to affirm would be sustained.

MOTION to dismiss or affirm.

The case is stated in the opinion.

*Mr. B. B. Boone* and *Mr. E. L. Russell* for the motion.*Mr. D. P. Bestor* and *Mr. R. H. Clarke* opposing.

## Opinion of the Court.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

This was a bill in equity filed in the Circuit Court of the United States for the Southern District of Alabama by the Bienville Water Supply Company against the city of Mobile and its mayor to enjoin defendants from making or carrying out any contract for supplying water to the inhabitants of the city or for constructing a system of water works for that purpose during the continuance of certain contracts between complainant and the city, made parts of the bill, and from building or acquiring a system of water works to bring water into the city during such continuance.

The parties were all citizens of Alabama, but complainant invoked the jurisdiction of the Circuit Court on the ground that the case was one arising under the Constitution of the United States, in that the contracts between it and the city were violated and impaired in the premises.

Defendants demurred, assigning special causes, among which were the following:

"(1) Because said bill, taken in connection with Exhibits 'A' and 'B,' made a part thereof, shows that no contract was made between the city of Mobile and the Bienville Water Supply Company as to the rates to be charged the inhabitants of said city for water, but that said contract merely fixed a maximum rate that said water company was to charge the inhabitants of said city of Mobile.

"(2) Because said bill of complaint shows that said city of Mobile was specially authorized and empowered by its charter and by the act of the general assembly of Alabama approved November 30, 1898, (and of which said act this court will take judicial notice,) to buy or to build, erect and maintain, and to operate water works for the supply of its inhabitants with water, and for the extinguishment of fires, and for sanitary, domestic and other purposes.

"(3) Because there is nothing shown or alleged in said bill of complaint and in said Exhibits 'A' and 'B,' made a part thereof, which precludes or estops the city of Mobile from

## Opinion of the Court.

buying, building, erecting, maintaining and operating a system of water works.

"(4) Because said Exhibits 'A' and 'B,' made a part of said bill of complaint, show that the only obligation resting upon and binding upon said city of Mobile is that it shall pay to said Bienville Water Supply Company the sum of fifty dollars (\$50.00) each per annum, payments to be made monthly, for two hundred and sixty fire hydrants placed on the streets of said city by said water supply company until the expiration of said contract on July 1, A.D. 1900, and it is not alleged or charged in said bill of complaint that the city of Mobile has or intends to repudiate its obligation to pay for said two hundred and sixty fire hydrants at the rate of fifty dollars each per annum, payments to be made monthly."

"(8) Because said bill of complaint fails to allege any facts which show that the city of Mobile has or intends to do or commit any act which will impair the said contract between the city of Mobile and the Bienville Water Supply Company, and which said contract is made a part of the bill of complaint.

"(9) Because it is shown upon the face of said bill of complaint that the city of Mobile did not grant the complainant the franchise to lay its said water mains and pipes in the city of Mobile, but that it was done by the general assembly of Alabama, and from which it appears that said city of Mobile had no lawful authority to grant or to enter into a contract with complainant, conferring thereby the exclusive right or privilege of supplying water to the inhabitants of said city of Mobile."

The court sustained the demurrer on the foregoing grounds and gave complainant fifteen days in which to amend, and, no amendment having been made, dismissed the bill. From that decree an appeal to this court was allowed and perfected, and motions to dismiss or affirm submitted.

The opinion of the Circuit Court, Toulmin, J., is reported 95 Fed. Rep. 539, and states the facts appearing from the bill, and pertinent legislation, in substance, correctly, as follows: Complainant was a corporation chartered by the legislature of Alabama for the purpose, among other things, of supplying

## Opinion of the Court.

water to the city of Mobile, a municipal corporation of the State, and its inhabitants, and was authorized to construct the needed canals, ditches, pipes, aqueducts, etc., best suited for the purpose, and was "charged with the duty of introducing into the port of Mobile (city) such supply of pure water as the domestic, sanitary and municipal wants thereof may require." Accordingly complainant laid mains and pipes in the streets of the city and established hydrants and fire plugs therein and built a reservoir and erected pumps connecting with such mains and pipes at large expense to itself; and used the property to supply the city and its inhabitants with water. August 15, 1888, complainant entered into a contract with the city to furnish for its use 260 fire hydrants, and to furnish water for fire service of a certain number of streams and pressure, and further agreed that the city should have the unrestricted use of the hydrants for such fire purposes and the free use of water for all municipal buildings, and that the company would not charge a greater or higher rate for water for domestic use than that specified in the contract. In consideration of complainant's stipulations, the city agreed to pay complainant for the use of the hydrants, monthly, at the rate of \$50 a hydrant per annum, during the continuance of the contract, which was for a term of six years. April 14, 1891, the contract was changed in some particulars and the term extended to twelve years. These two contracts were annexed to the bill and marked Exhibits "A" and "B."

The bill averred that complainant had complied and was complying with all the obligations and requirements of the contract on his part, and that the city had violated and was violating the contract in that it had bought and taken possession of a water works plant, and was now operating the same, selling water to customers and cutting rates below those fixed in the contract, and actually competing in the business of selling and furnishing water to its inhabitants, and that it had taken away some of complainant's customers, thereby decreasing its income. And further, that the city was building another system of water works to supply itself and its inhabitants with water, and that it claimed the right so to do under

## Opinion of the Court.

the provisions of its charter and an act of the legislature of Alabama of November 30, 1898.

The charter provided that the city might contract for, build, purchase or otherwise acquire public works subject to the approval of a majority vote of the citizens of Mobile at a special election called therefor, and in July, 1897, such an election was held, and a majority of the votes cast were in favor of the city contracting for or otherwise acquiring water works to be owned and operated by the city and the issuing of bonds to pay for the same. The act of November 30, 1898, authorized the issuing of bonds for that purpose. It was further averred that acting under and by virtue of the power granted by the charter and the act of November 30, the city had entered into a contract to have a system of water works built, and that the building of the same was now going on, and that it had made a contract with certain persons to take said bonds, who had already taken and paid for a part of them. Complainant contended that the city had no legal right to impair the value of its plant and to destroy or diminish its income therefrom, which would be the effect of the city's action in building water works and furnishing water to its inhabitants, and it was averred that defendant was insolvent, and that the only way complainant could protect itself was through the interposition of a court of equity. It was not asserted by complainant that it had been granted an exclusive franchise to furnish water to the city and its inhabitants, but that under the contracts the city had no right to furnish water to other persons or to build or acquire a system of water works to supply water to itself and its inhabitants, and that to do this was a violation thereof.

The Circuit Court observed that the city of Mobile granted complainant no rights or privileges whatever, but that the legislature of the State granted it the right to build water works and to use the streets of the city for water purposes, and authorized complainant and the city to contract together for the purpose of supplying the city with water. The contract was made, but there was no express provision in it for furnishing the inhabitants with water and no stipulation by complainant that it would do so, though it was clear that the



## Syllabus.

parties contemplated that complainant would contract with the inhabitants to supply them with water for domestic purposes, since it was stipulated that complainant should not charge for water so supplied higher rates than those specified therein. On the other hand, the city was authorized and empowered by its charter and the act of the legislature of November 30, 1898, to build or otherwise acquire water works of its own to supply water to itself and its inhabitants for the extinguishment of fires and for sanitary and domestic purposes, and the city in its contracts with complainant did not agree not to do so. It did agree to pay complainant for a certain number of hydrants erected and supplied by it, and to make the payments monthly, but there was no averment that the city had by act or word repudiated its obligation or failed or refused to make the payments stipulated for, or that it intended to do so.

In short, there were no facts averred showing that the city had violated, was violating, or intended to violate, its contracts with complainant, and there was no legislation to that end. Such being the state of the case, the Circuit Court did not err in dismissing the bill, and as there was color for the motion to dismiss, the motion to affirm will be sustained.

*Decree affirmed.*